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16  
17 **UNITED STATES DISTRICT COURT**  
18  
19 **CENTRAL DISTRICT OF CALIFORNIA**  
20

21 IN RE: TOYOTA MOTOR CORP.  
22 UNINTENDED ACCELERATION  
23 MARKETING, SALES PRACTICES, AND  
24 PRODUCTS LIABILITY LITIGATION

25 This documents relates to:

26 **ALL CASES**  
27  
28

Case No.: 8:10ML2151 JVS (FMOx)

**TOYOTA'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF (1) MOTION TO  
DISMISS PLAINTIFFS' ECONOMIC  
LOSS MASTER CONSOLIDATED  
COMPLAINT AND (2) MOTION TO  
STRIKE**

[Filed concurrently with Motion to  
Dismiss; Motion to Strike; Declaration of  
Lisa Gilford; Request for Judicial Notice;  
Appendix of Non-Federal and Out-of-  
State Authorities; and [Proposed] Orders]

Date: November 19, 2010  
Time: 9:00 a.m.  
Location: Court Room 10C  
Judicial Officer: Hon. James V. Selna

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1     **I. INTRODUCTION**

2           Plaintiffs' 153-page Master Consolidated Complaint ("MCC") is replete with  
3 hyperbole, misleading statistics, anecdotes, and legal conclusions, but notably absent  
4 is an identified common defect in the Electronic Throttle Control System ("ETCS" or  
5 "ETCS-i") of Toyota vehicles.<sup>1</sup> Half of the 52 purported class representatives have  
6 not experienced an unintended acceleration event, still own their vehicles, and drive  
7 them with no manifestation of the as-yet unidentified defect. Yet, they seek for  
8 themselves and on behalf of a putative nationwide class, economic damages and  
9 injunctive relief based not upon reliable, verifiable empirical evidence and valid  
10 scientific analysis, but upon a rush to judgment fueled by incomplete and inaccurate  
11 information and analysis.

12           On virtually every roadway in America, approximately 40 million of these same  
13 vehicles are providing daily transportation. Toyota has already undertaken substantial  
14 recalls and safety campaigns to fully address the identifiable sources of potential  
15 unintended acceleration ("UA") in its vehicles, namely floor mat entrapment and  
16 "sticky" accelerator pedals. In fact, to date, the accelerator pedal and floor mat recalls  
17 have been completed on 81.8% and 55.5% of recalled vehicles, respectively.<sup>2</sup> Notably  
18 though, the claims of the MCC are *not* predicated on either the floor mat or pedal  
19 recalls. Rather, the MCC is founded entirely on what Plaintiffs describe as an  
20 "unknown" defect in the ETCS. To date, no defect or malfunction has ever been  
21 identified in the ETCS.

22           Plaintiffs' inability to identify any *actual* defect in Toyota's ETCS within their  
23

24           <sup>1</sup> See MCC, ¶ 80. The Toyota vehicles referenced in the MCC include various  
25 models and years of Toyota, Lexus, and Scion vehicles.

26           <sup>2</sup> The floor mat recall was rolled out by model and only recently has been available  
27 for some models. The completion rate for the first three models is as follows: Lexus  
28 ES350 - 83.6%, Toyota Camry - 78.8%, and Toyota Avalon - 77.4%. These figures  
as well as the accelerator pedal recall completion rate already exceed the recognized  
national average for completion rate of automobile recalls after 18 months (72%).

1 410-paragraph MCC persists in the face of Plaintiffs receiving thousands of pages of  
2 documents from Toyota prior to filing the MCC, in addition to rarely equaled public  
3 attention surrounding these matters, including current investigations by the National  
4 Highway Traffic Safety Administration (“the NHTSA”), which has enlisted the aid of  
5 NASA and the National Academy of Sciences in studying Toyota’s ETCS. Plaintiffs  
6 fail to explain what aspect of the ETCS they claim is malfunctioning and how that  
7 malfunction is causing Toyota vehicles to experience UA. Instead, Plaintiffs merely  
8 jump to the unsupported conclusion that certain electronics, mechanics, and fail-safes  
9 should have been designed differently in the ETCS. Plaintiffs’ vague, unsupported  
10 allegations are no substitute for pleading a product defect theory. No doubt, Plaintiffs  
11 will “promise” this Court that they will develop such a theory, but it is nowhere to be  
12 found in the MCC.

13 The fact that so many named Plaintiffs and, by any statistical measure, the vast  
14 majority of putative class members, have experienced no manifestation of any defect  
15 in their vehicles, leads to the inescapable and fundamental legal conclusion that they  
16 have experienced no Article III injury. Without suffering an injury-in-fact, they have  
17 no standing to bring their claims and the Constitution bars their access to federal  
18 courts. The wisdom of this rule is unmistakable here: Even accepting the truth of  
19 Plaintiffs’ own unsubstantiated and speculative allegations in the MCC, fewer than  
20 six-tenths of one percent of Toyota owners have complained of UA since 2001.<sup>3</sup>

21 Looking at the named Plaintiffs as a whole, it is a varied group from 19  
22 different states,<sup>4</sup> with different makes, models, usage profiles, and conditions of their

23  
24 <sup>3</sup> Plaintiffs seem to rely on statistics to advance their sole ETCS defect theory, which  
25 Toyota reserves the right to contest. These statistics undoubtedly include incidents  
26 and complaints that were caused by a variety of other issues, including pedal  
misapplication. Moreover, Plaintiffs cite examples of alleged incidents in cars *without*  
ETCS, further undermining the credibility of their “unknown” ETCS defect theory.

27 <sup>4</sup> While Toyota agrees that this Court is the proper venue for this MDL proceeding,  
28 Toyota does not agree to venue or waive any venue objections that may be raised in  
the underlying actions. 28 U.S.C. § 1407(a); *Lexecon, Inc. v. Milberg Weiss Bershad*  
*Hynes & Lerach*, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998).

1 vehicles: from those who claim mere ownership of a Toyota vehicle and have never  
2 experienced UA, to those who allege collisions; from those who have received recall  
3 repairs, to those who have refused to drive their vehicles to their independent Toyota  
4 dealerships to complete the recall remedies; from those who have traded in or sold  
5 their vehicles, to those who continue to drive their vehicles without incident every  
6 day; and from those who are in the business of renting vehicles, to those in the  
7 business of insuring residual automobile values. Despite the highly individualized  
8 nature of Plaintiffs' claims, which begs the plausibility of class certification should  
9 this matter reach that stage, for purposes of this motion, we have "grouped" certain  
10 Plaintiffs and their legal claims to aid the Court's analysis of the legal sufficiency (and  
11 more specifically, lack thereof) of those claims. See Declaration of Lisa Gilford,  
12 dated September 13, 2010 ("Gilford Decl."), ¶ 2 & Exs. A-1 to A-9 (Charts  
13 Categorizing Class Representative Plaintiffs).

14 Fundamental issues, which are detailed below, including constitutional  
15 standing, privity, the enforceability of express warranties, and the NHTSA's  
16 predominant role, dictate that Plaintiffs' claims fail as a matter of law and should be  
17 dismissed.

## 18 **II. ARGUMENT AND CITATIONS OF AUTHORITY**

### 19 **A. Standard of Review.**

20 This Court must dismiss Plaintiffs' claims under Rule 12(b)(6) if, accepting the  
21 allegations as true, the MCC fails to state facts that would support relief. See *Parks*  
22 *Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In reviewing the  
23 allegations, however, the Court is "not bound to accept as true a legal conclusion  
24 couched as a factual allegation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50, 173 L.  
25 Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct.  
26 1955, 1965, 167 L. Ed. 2d 929 (2007)). The action should be dismissed when there is  
27 either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged  
28

1 under a cognizable legal theory.” *Balisteri v. Pacifica Police Dep’t*, 901 F.2d 696,  
2 699 (9th Cir. 1999).

3 Rule 8(a)(2) “demands more than an unadorned, the-defendant-unlawfully-  
4 harmed-me accusation.” *Id.* “A pleading that offers ‘labels and conclusions’ or ‘a  
5 formulaic recitation of the elements of a cause of action will not do.’” *Id.* (quoting  
6 *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965). “Nor does a complaint suffice if it  
7 tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* at 1949.  
8 (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. at 1966). “[O]nly a complaint that  
9 states a plausible claim for relief survives a motion to dismiss.” *Id.* at 1950. The  
10 Supreme Court explained:

11 To survive a motion to dismiss, a complaint must contain sufficient  
12 factual matter, accepted as true, to “state a claim to relief that is plausible  
13 on its face.” A claim has facial plausibility when the plaintiff pleads  
14 factual content that allows the court to draw the reasonable inference that  
15 the defendant is liable for the misconduct alleged. The plausibility  
16 standard is not akin to a “probability requirement,” but it asks for more  
17 than a sheer possibility that a defendant has acted unlawfully. Where a  
18 complaint pleads facts that are “merely consistent with” a defendant’s  
19 liability, it “stops short of the line between possibility and plausibility of  
20 ‘entitlement to relief.’”

21 *Id.* at 1949 (citations omitted) (quoting *Twombly*, 550 U.S. at 556-57, 570, 127 S. Ct.  
22 at 1965, 1966-68, 1974).

23 Lawsuits involving product defect allegations are no different and must be  
24 dismissed when they fail to state a claim upon which relief can be granted. *See*  
25 *Crouch v. Johnson & Johnson Consumer Co.*, No. 09-CV-2905, 2010 WL 1530152,  
26 at \*4 (D.N.J. Apr. 15, 2010) (dismissing, for lack of standing, the complaint of parent  
27 who used allegedly carcinogenic bath product on her infant for failure to plead a  
28 sufficient injury-in-fact). As shown below, even accepting the allegations as true,

1 Plaintiffs' MCC should be dismissed, because it fails to sufficiently allege facts  
2 supporting its claims for relief.<sup>5</sup>

3 Toyota is also entitled to strike certain allegations and requests for relief in the  
4 MCC as improper. Under Rule 12(f), a court may strike from a pleading "an  
5 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."  
6 Fed. R. Civ. P. 12(f). A court may grant a motion to strike class allegations if it is  
7 clear from the complaint that the class claims cannot be maintained. *See Sanders v.*  
8 *Apple, Inc.*, 672 F. Supp. 2d 978, 990-91 (N.D. Cal. 2009). Moreover, a court may  
9 strike prayers for relief which seek remedies that are unavailable as a matter of law, on  
10 the grounds that such remedies are immaterial. *See Stearns v. Select Comfort Retail*  
11 *Corp.*, No. 08-2746, 2010 WL 2898284, at \*8 (N.D. Cal. July 21, 2010).

12 **B. There Is No Support for Plaintiffs' Attempt to Apply California Law**  
13 **to the Entire Class.**

14 Plaintiffs have deliberately adopted the unusual strategy of pleading the claims  
15 of a purported nationwide class solely under one state's law. *Compare with, e.g., In*  
16 *re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1307-08 (S.D. Fla. 2010)  
17 (MDL court analyzing claims pled under the consumer statutes of 21 states); *In re*  
18 *New Motor Vehicles Canadian Export Antitrust Litig.*, 632 F. Supp. 2d 42, 44-46 (D.  
19 Me. 2009) (MDL court analyzing claims pled under the consumer statutes of 19  
20 states). Compounding their unusual tactic, Plaintiffs also asserted an entirely separate  
21 "First Amended Consolidated Complaint" consolidating only California-filed actions  
22 in an attempt to circumvent the black letter law requiring this Court to use all  
23 transferor courts' conflicts analysis frameworks (Dkt. 306) and Toyota has separately  
24 opposed this attempted gamesmanship (Dkt. 310).

25  
26 <sup>5</sup> A party may attach public records and documents referenced in a complaint to a  
27 motion to dismiss without converting the motion into one for summary judgment.  
28 *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). Likewise, a party  
may attach documents to provide background information to the court. *U.S. v. 14,02*  
*Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008).



1 Although conflicts of law issues are not yet ripe for decision in this matter, they  
2 go to the heart of constitutional due process requirements. If eventually necessary, a  
3 conflicts analysis will undoubtedly result in determining that California law is  
4 inapplicable to many claims. In note 54 of the MCC, Plaintiffs rightly anticipate this  
5 result and attempt to reserve the option to belatedly seek leave to amend the MCC to  
6 state claims under the laws of every state, despite fully understanding the outcome and  
7 consequences of their strategic decision not to do so now. Any such eventual motion  
8 for leave to amend would be improper because it will clearly prejudice Toyota and  
9 result in delay and inefficiency—all of which could have been avoided through proper  
10 pleading.

11 *1. The Motion to Dismiss Properly Addresses Only Those Causes of*  
12 *Action Pled in the Master Consolidated Complaint.*

13 Toyota addresses only the claims asserted in the MCC. *In re Emulex Corp. Sec.*  
14 *Litig.*, 210 F.R.D. 714, 715 (C.D. Cal. 2002) (“The function of a Rule 12(b)(6) motion  
15 is to test the legal sufficiency of the claims stated in the complaint”). Toyota cannot  
16 and should not be asked to anticipate what the next round of Plaintiffs’ claims might  
17 look like—or what state laws Plaintiffs might choose to assert—assuming they seek a  
18 second chance as note 54 to the MCC predicts.<sup>6</sup> Instead, Toyota will address the  
19 deficiency of the claims under California law, just as Plaintiffs have decided to plead  
20 them.

21 *2. A Conflicts Analysis Is Premature, and the “Choice of Law*  
22 *Allegations” Are Contested and Insufficient for the Analysis.*

23 Under the Supreme Court’s decision in *Phillips Petroleum Co. v. Shutts*, courts  
24 may not, consistent with constitutional due process requirements, apply the  
25

26 <sup>6</sup> Courts have denied leave to amend when facing attempts to manipulate the  
27 litigation. *Acri v. Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393,  
28 1398-99 (9th Cir. 1986) (denial of leave to amend affirmed where “the facts and the  
theory have been known to the party seeking amendment since the inception” and  
delay in asserting was a “tactical choice”).



1 substantive law of a single state to a multistate class of plaintiffs without performing a  
2 conflicts of law analysis. 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). In  
3 order to perform this due process analysis, this Court must analyze the contacts that  
4 each relevant state has to the claims asserted by each class member. *Id.* at 821-22.

5 Although Toyota looks forward to fully briefing this issue, the analysis cannot  
6 be made based solely on the limited allegations that have been cherry-picked by  
7 Plaintiffs as (a) Toyota strongly disputes the accuracy of the “Choice of Law  
8 Allegations”; (b) those allegations purposefully omit other key contacts in other states  
9 where Toyota does business; and, further, (c) facts concerning plaintiffs’ connections  
10 with various states are far from developed.<sup>7</sup> See *In re OnStar Contract Litig.*, 600 F.  
11 Supp. 2d 861, 864-865 (E.D. Mich. 2009) (noting that a party asserted some discovery  
12 would be necessary and holding that the conflicts of law analysis was premature at the  
13 motion to dismiss stage); *In re ConAgra Peanut Butter Prods. Liab. Litig.*, No. 1:07-  
14 md-1845-TWT, 2008 WL 2132233 at \*1-\*2 (N.D. Ga. May 21, 2008) (holding that  
15 rigorous conflicts of law analysis at the motion to dismiss stage was premature and  
16 more appropriately performed at the class certification stage). A conflicts analysis  
17 must be based on facts in evidence rather than on contested allegations that are only  
18 presumed to be true at the motion to dismiss stage, and the “Choice of Law  
19 Allegations” are vastly insufficient to perform the conflicts analysis. See *In re OnStar*  
20 *Contract Litig.*, No. 07-MDL-1867, 2010 WL 3516691, at \*3 (E.D. Mich. Aug. 25,  
21 2010) (analyzing conflicts issues after limited discovery, rather than at the motion to  
22 dismiss stage of litigation).

23 As Toyota explained in its September 2 filing (Dkt. 310), the Supreme Court  
24 has dictated that federal courts must apply the conflicts analysis frameworks used in

25  
26 <sup>7</sup> As just one example of why the MCC’s “Choice of Law Allegations” cannot be  
27 credited, Plaintiffs attempt within a single paragraph to emphasize that California  
28 contains manufacturing facilities, a single research and development center and one  
design center, while simultaneously ignoring Toyota’s significant relevant presences  
in, e.g., Kentucky, Michigan, Indiana, Texas and Arizona. (MCC, ¶ 263).

1 the transferor forum's court. *Ferens v. John Deere Co.*, 494 U.S. 516, 532, 110 S. Ct.  
2 1274, 108 L. Ed. 2d 443 (1990); *Van Dusen v. Barrack*, 376 U.S. 612, 638, 84 S. Ct.  
3 805, 11 L. Ed. 2d 945 (1964). As a predicate to performing its conflicts analysis, this  
4 Court will need to determine the extent to which conflicts exist between the laws of  
5 states throughout the nation, for each of the common law causes of action asserted by  
6 the plaintiffs, and flesh out the differences between the laws of the states. *See, e.g.*,  
7 *Thompson v. Jiffy Lube Int'l, Inc.*, 250 F.R.D. 607, 625-28 (D. Kan. 2008); *Rivera v.*  
8 *Bio Engineered Supplements & Nutrition, Inc.*, No. SACV-07-1306, 2008 WL  
9 4906433, at \*2-\*3 (C.D. Cal. Nov. 13, 2008). This analysis typically requires  
10 extensive briefing as to the elements and requirements of every state's cause of action.  
11 *See OnStar Contract Litig.*, 2010 WL 3516691, at \*3 (resolving conflicts issues with a  
12 separate and detailed 35-page opinion once some discovery had been performed and  
13 the parties had submitted separate extensive briefing on the conflicts issues).

14 Once this Court has determined the parameters of the differences between the  
15 fifty states' laws regarding the relevant causes of action, it must determine the relevant  
16 contacts with each state and apply the conflicts analyses for each of the transferor  
17 states to determine whether that transferor state would apply its own forum's law or  
18 the law of one or more other states. Plaintiffs cannot obtain application of California  
19 law to a nationwide class simply by virtue of pleading that California law applies.  
20 *Rivera*, 2008 WL 4906433, at \*2-\*3. Nonetheless, even under California law,  
21 Plaintiffs' claims fail and should be dismissed.

22 **C. Numerous Consumer Plaintiffs and All Non-Consumer Plaintiffs**  
23 **Lack Standing Because They Have Not Suffered Injury-In- Fact.**

24 Standing is a constitutional gatekeeper—"an essential and unchanging part of  
25 the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*,  
26 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "That a suit may be a  
27 class action ... adds nothing to the question of standing, for even named plaintiffs who  
28 represent a class 'must allege and show that they personally have been injured, not

1 that injury has been suffered by other, unidentified members of the class to which they  
2 belong and which they purport to represent.” *Simon v. E. Ky. Welfare Rights Org.*,  
3 426 U.S. 26, 40, n.20, 96 S. Ct. 1917, 48 L. Ed. 2d 450, 462 (1976) (quoting *Warth v.*  
4 *Seldin*, 422 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L. Ed. 2d 343, 357 (1975)).  
5 Further, Article III standing requirements are not coextensive with state law—  
6 violations of state law cannot independently confer access to federal courts. *Lee v.*  
7 *Am. Nat’l Ins. Co.*, 260 F.3d 997, 1000-02 (9th Cir. 2001); *Cantrell v. City of Long*  
8 *Beach*, 241 F.3d 674, 683 (9th Cir. 2001). Plaintiffs must demonstrate constitutional  
9 standing, including an actual injury. *See Lee*, 260 F.3d at 999-1000 (affirming trial  
10 court’s ruling that “[e]ven though the California unfair business practices statute  
11 requires no such actual injury to pursue a claim in state court ... Article III of the  
12 Constitution ‘takes priority’ in federal court over the California statute’s more liberal  
13 standing rules”). In short, the Constitution requires that this Court dismiss the claims  
14 of any named Plaintiff who cannot demonstrate constitutional standing.

15 Article III requires that (1) the plaintiff suffer an injury-in-fact which is actual,  
16 not hypothetical; (2) there is a causal connection between the injury and the conduct  
17 complained of; and (3) it is likely, not merely speculative, that the injury will be  
18 redressed by a favorable decision. *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136. Here,  
19 numerous named Plaintiffs fail to satisfy the Article III standing requirements because  
20 they have not suffered any cognizable injury. Additionally, these Plaintiffs cannot  
21 satisfy the causal connection requirement for standing because they have not alleged  
22 an actual injury which was caused by Toyota’s conduct. The “causal connection  
23 between the injury and the conduct complained of” required by Article III is not  
24 satisfied by mere speculation and “subjective apprehension” about what might happen  
25 in the future. *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136; *see Mayfield v. United*  
26 *States*, 599 F.3d 964, 970 (9th Cir. 2010).

1                   1.     *Plaintiffs Who Did Not Experience a Manifestation of the Alleged*  
2                             *Defect Lack Standing as They Have Not Suffered Injury-in-Fact.*

3             The numerous purported class representatives who have not experienced the  
4 alleged defect have not suffered actual injury-in-fact and therefore, lack standing to  
5 assert claims. The mere *possibility* that a defect *might* cause a product to fail is not  
6 enough. The Ninth Circuit and other federal and California state courts have  
7 consistently rejected the type of defect-without-malfunction theory asserted by many  
8 of the Plaintiffs in this lawsuit. *See, e.g., Birdsong v. Apple, Inc.*, 590 F.3d 955, 960-  
9 61 (9th Cir. 2009); *Whitson v. Bumbo*, No. C07-05597, 2009 WL 1515597, at \*6  
10 (N.D. Cal. Apr. 16, 2009); *see also O'Neil v. Simplicity, Inc.*, 553 F. Supp. 2d 1110,  
11 1115 (D. Minn. 2008) (“It is simply not enough for a plaintiff to allege that a product  
12 defect suffered by others renders his or her use of that same product unsafe; the  
13 plaintiff must instead allege an *actual manifestation* of the defect *that results in some*  
14 *injury* in order to state a cognizable claim ...”), *aff'd*, 574 F.3d 501 (8th Cir. 2009); *In*  
15 *re Gen. Motors Corp. Anti-Lock Brake Prods. Liab. Litig.*, 966 F. Supp. 1525, 1530  
16 (E.D. Mo. 1997) (holding that manifestation “is a prerequisite to recovery” and  
17 dismissing claims regarding “defective” anti-lock brakes that only created a  
18 “potential” for failure), *aff'd sub nom. Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th  
19 Cir. 1999).

20             Furthermore, Ninth Circuit courts have held that a plaintiff lacks standing in the  
21 absence of a manifested defect or actual economic loss resulting from the alleged  
22 defect. In *Whitson v. Bumbo*, the named plaintiff purchased a Bumbo “Baby Sitter”  
23 Seat manufactured by the defendants. 2009 WL 1515597, at \*1. The Consumer  
24 Products Safety Commission (CPSC) recalled the Bumbo seat, noting that out of  
25 “about 1 million” units sold, the CPSC had “received 28 reports of young children  
26 falling out of the Bumbo Baby Sitter seats, including three skull fractures.” *Id.* at \*2.  
27 Whitson’s class action complaint, which included both a UCL claim and an implied  
28 warranty claim, alleged that the child seat was defective and dangerous. *Id.* at \*4, \*7.

1 However, Whitson did not allege that her child's seat had tipped over or had injured  
2 any child. *Id.* at \*8. Given that Whitson had not experienced any defect or pled any  
3 specific economic harm, the trial court dismissed the action for lack of standing,  
4 noting that the "complaint oscillates between tort and contract law language but fails  
5 to allege any actual injury." *Id.* at \*6.

6 Similarly, in a recent decision from the Northern District of California, the  
7 court dismissed a class action against Toyota for lack of standing, because the class  
8 representatives failed to sufficiently allege that they had suffered injury-in-fact.  
9 *Contreras v. Toyota Motor Sales USA, Inc.*, No. C 09-06024, 2010 WL 2528844, at  
10 \*4-\*6 (N.D. Cal. June 18, 2010). In *Contreras*, the plaintiffs pursued a class action  
11 against Toyota alleging that brake issues would arise when their cars were driven  
12 "under certain driving conditions in low temperatures." *Id.* at \*1. Like many of the  
13 putative class members in this case, the *Contreras* plaintiffs failed to allege that their  
14 vehicles had malfunctioned as a result of any defect or that they incurred any out-of-  
15 pocket expenses, but merely that they had "been injured ... because had they known  
16 of the alleged defect, they would not have purchased or would have paid less for [their  
17 vehicles]." *Id.* at \*2. The *Contreras* plaintiffs also contended that their vehicles were  
18 "worth substantially less than they would have been without the alleged defect." *Id.* at  
19 \*2. The court rejected the plaintiffs' standing argument, holding that the plaintiffs  
20 "fail[ed] to allege any actual injury" and "failed to allege facts sufficient to show that  
21 they have suffered 'injury in fact.'" *Id.* at \*6.

22 As in *Whitson* and *Contreras*, numerous class representatives have failed to  
23 plead an actual injury-in-fact and instead, have attempted to piggy back their claims  
24 onto those Plaintiffs who have alleged incidents of UA or out-of-pocket expenses  
25 resulting from the alleged ETCS-i defect. This is simply not permitted as a matter of  
26 law. Economic loss injuries based upon some expected future loss in resale value also  
27 are "simply too speculative" to establish standing. *See Briehl v. Gen. Motors Corp.*,  
28 172 F.3d 623, 628-629 (8th Cir. 1999) ("The Plaintiffs' assertion that their ABS-



1 equipped vehicles are defective and that they have suffered a loss in resale value as a  
2 result of the defect is insufficient as a matter of law to plead a claim under any theory  
3 the Plaintiffs have advanced.”). In *Briehl*, the Eighth Circuit expressly rejected  
4 plaintiffs’ argument that their economic loss was measured by the difference between  
5 the “vehicle with the ABS system that they expected and the system that [was]  
6 actually installed in each of their vehicles.” *Id.* at 629. Plaintiffs make precisely the  
7 same argument in the MCC. (MCC, ¶ 336).

8 Here, the MCC reveals that 22 of the 48 Consumer Plaintiffs (and all four of the  
9 Non-Consumer Plaintiffs) did not experience the manifestation of the alleged ETCS-i  
10 defect, or any other defect with their vehicles. Nor did they spend any money as a  
11 result of the alleged defect. *See* Gilford Decl. Ex. A-2, (“Grp. 1 Pls.”). Instead, their  
12 claims against Toyota are based solely upon their speculative contention that an  
13 inherent “SUA defect” has reduced the value of their vehicles. For example, class  
14 representative Plaintiff Ebony Brown merely alleges that “[s]he owns a 2009 Toyota  
15 Camry.” (MCC, ¶ 38). This allegation is clearly insufficient to satisfy the “injury in  
16 fact” requirement for standing, which requires Plaintiffs to plead that they suffered or  
17 are likely to suffer a “distinct and palpable injury” as a result of Toyota’s alleged  
18 wrongful conduct. *See Birdsong*, 590 F.3d at 961.

19 At best, these Plaintiffs fear that at some point in the future their cars may  
20 manifest a defect or that if they sell their vehicles in the future they will fetch a lower  
21 price because of latent defects that have not yet materialized.<sup>8</sup> Such a remote, might-  
22 happen-in-the-future-claim clearly does not amount to an actual and concrete injury-  
23 in-fact under any measure of the law or logic. *See Lujan*, 504 U.S. at 560 (requiring  
24 that plaintiffs suffer an injury-in-fact that is actual, not hypothetical): *see also*  
25

26  
27 <sup>8</sup> Less than 14 of the 52 plaintiffs allege that they sold or even attempted to sell their  
28 vehicles, and only seven allege that they sold their vehicles at a loss. *See* Gilford  
Decl. Exs. A-8, A-9. All of the rest of the plaintiffs base their alleged injuries on  
nothing more than conjecture and speculation.

1 *Birdsong*, 590 F.3d at 961 (finding no standing where “plaintiffs simply [did] not  
2 plead facts showing that hearing loss from iPod use [was] actual or imminent, as  
3 required” and rejecting plaintiffs’ “inherent risk” and diminished value argument);  
4 *Contreras*, 2010 WL 2528844, at \*6 (finding no standing where plaintiffs failed to  
5 allege that their vehicles manifested the alleged defect with the vacuum-assisted brake  
6 system and it was unlikely that they would do so).

7 Therefore, the 22 Consumer Plaintiffs and all four Non-Consumer Plaintiffs,  
8 listed in Ex. A-2 of the Gilford Decl., lack standing, and their claims should be  
9 dismissed.<sup>9</sup>

10 2. *Plaintiffs Received The Benefit of the Bargain, and Thus, Have Not*  
11 *Suffered an Injury-In-Fact.*

12 Plaintiffs’ contention that they suffered injury-in-fact the moment they  
13 purchased their vehicles because they bargained for defect-free vehicles, also ignores  
14 their written warranties which are an integral part of the transaction. Where a  
15 consumer receives the benefit of his bargain, he cannot satisfy Article III’s standing  
16 requirement for lack of injury. *See, e.g., Baggett v. Hewlett-Packard Co.*, No.  
17 SACV07-0667, 2009 WL 3178066, at \*3 (C.D. Cal. Sept. 29, 2009) (holding that  
18 there was no violation of the UCL where plaintiff “received exactly what he bargained  
19 for”); *Peterson v. Cellco P’ship*, 164 Cal. App. 4th 1583, 1591, 80 Cal. Rptr. 3d 316,  
20 322 (2008) (same).

21 In the case of a product defect claim, a plaintiff who received the benefit of a  
22 warranty to repair or replace the purportedly defective product has suffered no injury.  
23 *See Thiedemann v. Mercedes-Benz USA, LLC*, 183 N.J. 234, 251-352, 872 A.2d 783,  
24 795 (2005). In *Thiedemann*, the New Jersey Supreme Court considered whether

25  
26 <sup>9</sup> Similarly, Plaintiffs cannot represent class members who have not experienced any  
27 manifestation. *See, e.g., Bishop v. Saab Auto A.B.*, No. CV95-0721, 1996 WL  
28 33150020, at \*5 (C.D. Cal. Feb. 16, 1996) (“The courts have refused to certify class  
actions based on similar ‘tendency to fail’ theories because the purported class  
includes members who have suffered no injury and therefore lack standing to sue.”).



1 plaintiffs had suffered an “ascertainable loss of moneys or property’ ... as a result of”  
2 defendant’s conduct for purposes of establishing damages under New Jersey’s  
3 Consumer Fraud Act (“CFA”). 872 A.2d at 786. The *Thiedemann* plaintiffs had  
4 alleged that Mercedes failed to disclose material defects in fuel gauges, and the New  
5 Jersey Supreme Court explained that there could be no claim:

6 Defects can, and do, arise with complex instrumentalities such as  
7 automobiles. The mere fact that an automobile defect arises does not  
8 establish, in and of itself, an actual and ascertainable loss to the vehicle  
9 purchaser. Indeed, the warranty provided as part of the contract of sale or  
10 lease is part of the benefit of the bargain between the parties. The defects  
11 that arise and are addressed by warranty, at no cost to the consumer, do  
12 not provide the predicate “loss” that the CFA expressly requires ....

13 *Id.* at 794.

14 This same reasoning applies here. The warranty applicable to Plaintiffs’  
15 vehicles provides that Toyota will make any “repairs and adjustments needed to  
16 correct defects in materials or workmanship.” See Gilford Decl. ¶ 3 & Ex. B,  
17 Warranty Manuals, at 25, 107, 181.<sup>10</sup> The warranty further provides that the  
18 “performance of necessary repairs and adjustments is the exclusive remedy.” *Id.* at  
19 24, 106, 179. With respect to the Plaintiffs who claim to have experienced a defect or  
20 malfunction, their sole and exclusive remedy is to seek and obtain warranty repairs  
21 from an authorized Toyota dealer. *A fortiori*, with respect to the 22 Consumer  
22 Plaintiffs and the four Non-Consumer Plaintiffs identified in Ex. A-2 of the Gilford  
23 Decl., they have not even experienced a defect which would require warranty work.  
24 Because Plaintiffs have received exactly what they bargained for, they have suffered  
25 no legally cognizable injury in connection with their alleged “defects” and thus have  
26

27 <sup>10</sup> The Warranty Manuals attached as Ex. B to the Gilford Decl. are representative of  
28 the warranties applicable to each vehicle identified in the MCC in all respects relevant  
to the arguments set forth therein.

1 no standing to sue as a matter of law.

2 **D. Plaintiffs Lack Standing to Bring the UCL, FAL, and CLRA Claims.**

3 In addition to the lack of standing under Article III, all 48 Consumer Plaintiffs  
4 and all four Non-Consumer Plaintiffs lack standing to assert claims under the  
5 Consumer Legal Remedies Act (“CLRA”), the California Unfair Competition Law  
6 (“UCL”), and the California False Advertising Law (“FAL”) (Counts I-III).

7 *1. Plaintiffs Lack Standing for the UCL and FAL Claims Under*  
8 *California Proposition 64.*

9 With the passing of Proposition 64, California Business and Professions Code  
10 sections 17200 *et seq.* and 17500 *et seq.* were amended to provide that a plaintiff may  
11 “pursue representative claims for relief on behalf of others” only if plaintiff has  
12 “suffered injury in fact and has lost money or property as a result of” the alleged  
13 wrongful conduct. Cal. Bus. & Prof. Code §§ 17204, 17535 (emphasis added); *see In*  
14 *re Tobacco II Cases*, 46 Cal. 4th 298, 325, 93 Cal. Rptr. 3d 559 (2009); *see also In re*  
15 *Actimmune Mktg. Litig.*, No. C 08-02376, 2009 WL 3740648, at \*15 (N.D. Cal. Nov.  
16 6, 2009) (“the standing analysis under the UCL and FAL is identical”).

17 In order to have standing to assert these UCL and FAL claims after Proposition  
18 64, the class representatives must show that: (1) they have suffered actual “injury in  
19 fact” and have “lost money or property” and (2) such injury occurred as a result of  
20 Toyota’s alleged violation of the UCL or FAL. *See Laster v. T-Mobile USA, Inc.*, 407  
21 F. Supp. 2d 1181, 1193-94 (S.D. Cal. 2005), *aff’d*, 252 F. App’x 777 (9th Cir. 2007).  
22 The requisite injury must be “an invasion of a legally protected interest which is  
23 (a) concrete and particularized, and (b) actual or imminent, not conjectural or  
24 hypothetical.” *Buckland v. Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 814, 66  
25 Cal. Rptr. 3d 543, 555 (2007) (internal citation omitted). Plaintiffs simply do not  
26 satisfy these standing requirements.<sup>11</sup>

27  
28 <sup>11</sup> The MCC asserts a UCL based upon unlawful, unfair, and fraudulent conduct.  
(MCC, ¶¶ 315-29). Each prong of the UCL is a separate and distinct theory of

a. Numerous Plaintiffs Lack Standing Because They Do Not Allege an “Injury in Fact” or “Lost Money or Property.”

As previously established, *supra* Section II.C., at pp. 8-15, 22 of the 48 Consumer Plaintiffs named in the MCC have failed to allege any actual “injury in fact.” For the same reasons, the 22 Consumer Plaintiffs and the four Non-Consumer Plaintiffs named in the MCC fail to adequately allege any loss of money or property as required for standing.

These Plaintiffs are representative of the vast majority of putative class members, *i.e.*, the millions of members of the motoring public who drive Toyota vehicles every day without incident. Plaintiffs’ allegations that their vehicles might have an unmanifested defect and are therefore potentially worth less than what they paid for them are not sufficient to show that they lost money or property necessary to confer standing for the UCL and FAL claims. *See Contreras*, 2010 WL 2528844, at \*6 (no standing where plaintiffs did not allege they were forced to replace their vehicles or that they incurred any out-of-pocket damages and rejecting plaintiffs’ argument that “their vehicles [were] worth substantially less” with the alleged defect as “conclusory and unsupported by any facts”); *Morris v. BMW of N. Am., LLC*, No. C 07-02827, 2007 WL 3342612, at \*4 (N.D. Cal. Nov. 7, 2007) (dismissing UCL claim for lack of standing where Plaintiffs did not lose money as a result of alleged conduct).

Additionally, Plaintiffs base their UCL claims that Toyota engaged in unlawful business practices in part on alleged violations of the National Traffic and Motor Vehicle Safety Act of 1996, 49 U.S.C. § 30101 *et seq.* (“Safety Act”), relating to the return of a vehicle’s throttle position to an idle position. (MCC, ¶¶ 319-324). However, absent a violation of law which results in some harm to each of the

liability. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). Toyota seeks dismissal of each prong of Plaintiffs’ UCL claim for lack of standing under Proposition 64 and Article III.

1 Plaintiffs, they lack standing to maintain a UCL claim founded on the unlawful prong.  
2 *See Daro v. Super. Ct.*, 151 Cal. App. 4th 1079, 1098-1901, 61 Cal. Rptr. 3d 716, 728-  
3 30 (2007) (concluding that plaintiffs could not maintain claim under UCL's unlawful  
4 prong when they suffered no harm as a result of violation of law at issue). The 22  
5 Consumer Plaintiffs and 4 Non-Consumer Plaintiffs who do not allege any instance of  
6 UA lack standing to bring the UCL claim for failure to satisfy the injury-in-fact  
7 requirement. Furthermore, all 52 named Plaintiffs lack standing to assert the UCL  
8 claim against Toyota based on the unlawful prong, because they have failed to allege  
9 an actual injury caused by Toyota's alleged violation of the Safety Act and related  
10 regulations identified in the MCC. (MCC, ¶¶ 319-24).

11 b. Plaintiffs Lack Standing Because They Do Not Allege  
12 Actual Reliance.

13 Furthermore, all of the named Plaintiffs lack standing to assert FAL and UCL  
14 claims based on fraudulent conduct. The California Supreme Court has clarified that  
15 "actual reliance" is required to satisfy the standing requirements for fraud-based UCL  
16 or FAL claims. *See Tobacco II*, 46 Cal. 4th at 327 ("a plaintiff must plead and prove  
17 actual reliance to satisfy the standing requirement" of the UCL and FAL); *Gertz v.*  
18 *Toyota Motor Corp.*, CV 10-1089 PSG (C.D. Cal. Sept. 10, 2010) (in the absence of  
19 specific allegations of actual reliance on representations or advertisements regarding  
20 plaintiffs' Toyota Prius, plaintiff lacks standing to maintain a UCL claim).<sup>12</sup> *See also*  
21 *Actimmune*, 2009 WL 3740648, at \*8 (the phrase "as a result" mandates that "a  
22 plaintiff demonstrate 'actual reliance' upon a defendant's misrepresentation or  
23 omission"). Although Plaintiffs need not demonstrate individualized reliance on  
24 specific representations where a long-term advertising campaign is alleged, *see*  
25 *Tobacco II*, 46 Cal. 4th at 327, they must, nonetheless, plead actual reliance. Plaintiffs  
26

27 <sup>12</sup> A copy of Judge Gutierrez's decision in *Gertz v. Toyota Motor Corp.* is included in  
28 the Appendix of Authorities.

1 must allege that the alleged misrepresentations or omissions were an immediate cause  
2 of the alleged injury-causing conduct. *See Actimmune*, 2009 WL 3740648, at \*8  
3 (rejecting plaintiffs’ “generalized exposure” argument with regard to defendants’  
4 allegedly fraudulent marketing campaign argument). The MCC is conspicuously  
5 devoid of any such allegations.

6 The MCC exhaustively catalogues various omissions and representations  
7 allegedly made in an effort to establish an extensive and long-term marketing  
8 campaign by Toyota. (MCC, ¶¶ 81-105). However, in spite of this laundry list of  
9 alleged deceptive or false statements and omissions, Plaintiffs do not allege “with any  
10 degree of specificity” that they personally were exposed to a single representation  
11 made by Toyota, let alone that they actually relied upon any such representation when  
12 purchasing their vehicles. *Gertz v. Toyota Motor Corp.*, CV 10-1089 PSF (C.D. Cal.  
13 Sept. 10, 2010) (where plaintiff does not allege that she saw specific alleged  
14 advertisements, her CLRA claim fails); *Actimmune*, 2009 WL 3740648, at \*11 (no  
15 standing where the majority of plaintiffs failed to allege actual exposure to  
16 defendants’ representations concerning the allegedly defective product).

17 Instead, the MCC merely alleges in a conclusory manner that Plaintiffs “relied  
18 on the misrepresentations and/or omissions of Toyota with respect to the safety and  
19 reliability of the vehicles.” (MCC, ¶¶ 327, 335). Such generalized statements are  
20 insufficient to satisfy the actual reliance requirement for standing under the UCL and  
21 FAL and the requisite federal pleading standards that require more than conclusory  
22 allegations. *See Actimmune*, 2009 WL 3740648, at \*8 (dismissing UCL, FAL, and  
23 CLRA claims where plaintiffs failed to plead actual reliance on defendants’ allegedly  
24 fraudulent marketing campaign); *Gertz v. Toyota Motor Corp.*, *supra*; *Laster*, 407 F.  
25 Supp. 2d at 1194 (dismissing UCL and FAL claims for lack of standing, where  
26 plaintiffs failed to allege “that they saw, read, or in any way relied on” meticulously  
27 described advertisements; “nor [did] they allege that they entered into the transaction  
28 as a result of [the] advertisements”).



1 Nor can Plaintiffs rely on a presumption of reliance that arises upon an adequate  
2 showing that a misrepresentation is material. *See Tobacco II*, 46 Cal. 4th at 327.  
3 Plaintiffs' consumer protection claims are based upon the conclusory premise that  
4 Toyota vehicles with ETCS-i are defective. Yet, Plaintiffs have not alleged a single  
5 fact that would permit the Court to reasonably draw such an inference, let alone  
6 identified any material misrepresentations made by Toyota. Because the MCC does  
7 not, specifically, allege that Plaintiffs relied upon any representations by Toyota when  
8 purchasing their vehicles and Plaintiffs have failed to plead any facts to support their  
9 purely conclusory theory of a defect, there can be no presumption of reliance. *See In*  
10 *re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 1053-54 (N.D. Cal. Apr. 28, 2009)  
11 (rejecting plaintiffs' attempt to avoid their burden of satisfying "the requirement that  
12 there be a connection between the misdeed complained of and the loss suffered under  
13 state law"); *see also In re Facebook PPC Adver. Litig.*, 09-cv-03043, 2010 WL  
14 1746143, at \*7 (N.D. Cal. Apr. 22, 2010) (finding no presumption of reliance where  
15 plaintiffs did not allege that the representations existed at the time of the transaction or  
16 that they knew of the existence of the representations at that time).

17 2. *Plaintiffs Lack Standing Under the CLRA Because They Cannot*  
18 *Show Actual Causation and Reliance.*

19 Similarly, Plaintiffs lack standing to bring the CLRA claim. Under Civil Code  
20 Section 1780(a), a CLRA claim may be brought only by a consumer who "suffers any  
21 damage as a result of the use or employment" of a proscribed practice. "In  
22 comparison to the UCL and FAL, the CLRA has a more stringent standing  
23 requirement, in that a class representative must show actual causation and reliance."  
24 *Actimmune*, 2009 WL 3740648, at \*16; *see also Contreras*, 2010 WL 2528844, at \*4  
25 ("In order to establish standing under their CLRA claim, Plaintiffs must establish they  
26 suffered an actual injury as a result of [defendant's] alleged conduct"); *Wilens v. TD*  
27 *Waterhouse Group, Inc.*, 120 Cal. App. 4th 746, 754, 15 Cal. Rptr. 3d 271, 276 (2003)  
28 ("Relief under the CLRA is specifically limited to those who suffer damages, making

1 causation a necessary element of proof.”).

2 As previously discussed, Plaintiffs have not alleged any facts indicating that  
3 they were exposed to or relied upon any of Toyota’s alleged misrepresentations and  
4 omissions when purchasing their vehicles. Nor have they alleged any facts that could  
5 reasonably establish a causal connection between Plaintiffs’ alleged economic harm  
6 and the purportedly wrongful conduct by Toyota identified in the MCC. There is no  
7 connection between these alleged ETCS defects and related claims and the alleged  
8 damages Plaintiffs claim they suffered. Therefore, in the absence of actual causation  
9 and reliance, Plaintiffs cannot meet the stringent CLRA standing requirements as a  
10 matter of law. *See Baba v. Hewlett-Packard Co.*, No. C 09-05946, 2010 WL  
11 2486353, at \*5 (N.D. Cal. June 16, 2010) (dismissing CLRA claim where the  
12 complaint failed to allege reliance on any representations to plaintiffs “before or  
13 during their respective transactions” and, instead, focused on representations made by  
14 defendant *after* the purchase of the allegedly defective products); *Brownfield v. Bayer*  
15 *Corp.*, 2:09-cv-00444, 2009 WL 1953035, at \*4 (E.D. Cal. July 6, 2009) (dismissing  
16 CLRA claim where plaintiffs’ “conclusory allegations” did not suffice to “adequately  
17 allege a connection between the [p]laintiffs’ injury, if any, and the complained-of-  
18 conduct” by defendants).

19 **E. Plaintiffs’ UCL, FAL, CLRA and Fraud By Concealment Claims**  
20 **Fail as a Matter of Law.**

21 These claims have a consistent foundation: that Toyota fraudulently concealed  
22 “defects” in the ETCS of its vehicles and consequently, fraudulently misrepresented  
23 the safety of its vehicles. (*See, e.g.*, MCC, ¶¶ 300, 324, 335, 400). The logical gap  
24 apparent on the face of the MCC is that even now, after Plaintiffs’ presumed  
25 inspection of vehicles, receipt of countless documents, and a public investigation of  
26 the issue, Plaintiffs themselves still cannot define this allegedly concealed defect. Yet  
27 Plaintiffs claim that for years Toyota deliberately concealed that the “ETCS ... was  
28 defectively designed or manufactured.” (MCC, ¶ 302). The MCC begs the question



1 of how Toyota could have fraudulently concealed and misrepresented a condition that  
2 no one, even today, can identify. Plaintiffs offer instead allegations of statistics  
3 derived from unverified reports supposedly related to UA. In other words, Plaintiffs'  
4 defect allegations, to the extent they exist at all, rest entirely on *allegations* found in  
5 other, unverified sources. Plaintiffs also unremarkably note that Toyota has  
6 "marketed its vehicles as 'safe'." (*See, e.g.*, MCC, ¶ 81). The law, however, requires  
7 substantially more when accusing a party of fraud.

8           1. *Plaintiffs' FAL, CLRA, UCL, and Fraud by Concealment Claims*  
9           *Are Subject to the Heightened Pleading Standard of Rule 9(b).*

10           Claims sounding in fraud are subject to the heightened pleading standard of  
11 Fed. R. Civ. P. 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.  
12 2009) (applying Rule 9(b) standard to UCL and CLRA claims); *Gertz v. Toyota Motor*  
13 *Corp., supra*, CV 10-1089 PSF (C.D. Cal. Sept. 10, 2010). Where fraud is not a  
14 necessary element of a claim, but a plaintiff alleges a unified course of fraudulent  
15 conduct and relies on that course of conduct as the basis of such claim, any assertions  
16 of fraud must comport with Rule 9(b) or be disregarded. *Vess v. Ciba-Geigy Corp.*  
17 *USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). Likewise, when a plaintiff alleges some  
18 fraudulent and some non-fraudulent conduct in support of a claim, Rule 9(b)'s  
19 heightened pleading requirements are applied specifically to the fraudulent  
20 "averments" and those found wanting should be stripped from the claim. *Id.* at 1104-  
21 05. To satisfy this heightened pleading standard, Rule 9(b) requires that Plaintiffs  
22 plead the "who, what, where, when and how" of the alleged misconduct to  
23 demonstrate it was something more than a mere business mistake. *Cooper v. Pickett*,  
24 137 F.3d 616, 627 (9th Cir. 1997). A court may dismiss a claim grounded in fraud  
25 when its allegations fail to satisfy Fed. R. Civ. P. 9(b)'s heightened pleading  
26 requirements. *See Vega v. JP Morgan Chase Bank, N.A.*, 654 F. Supp. 2d 1104, 1114  
27 (E.D. Cal. 2009). *Gertz v. Toyota Motor Corp., supra*.

28           Because Plaintiffs' FAL, CLRA, fraud by concealment claims, and a portion of

1 the UCL claim each sound in fraud, they are subject to Rule 9(b)'s heightened  
2 pleading standard. Nothing in the MCC, however, fulfills this standard. At best,  
3 Plaintiffs' allegations of deliberate concealment indicate instead only that Toyota's  
4 and others' investigations of a handful of *alleged* UA incidents or engine surging were  
5 inconclusive. (*See, e.g.*, MCC ¶¶ 115, 139). It is insufficient under Rule 9(b) to  
6 speculate about potential defects, (*see id.*, ¶ 245 (recounting a vague list of  
7 components that "may be found to" cause UA)), and without any assertion of who,  
8 what, where, when, and how, claim that Toyota committed fraud by failing to disclose  
9 a product defect that is utterly undefined. Nowhere in the lengthy text of the MCC do  
10 Plaintiffs make a specific, fact-based allegation that Toyota knew of any specific  
11 defect and knowingly concealed it.

12         Claiming an undefined product defect and attempting to allege fraud around it  
13 is nothing new. As one court noted, "allegations of this nature ... could be made  
14 about any alleged design defect in any manufactured product. The heightened  
15 pleading requirements of Rule 9(b) were designed to avoid exactly this situation."  
16 *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 974 (N.D. Cal. 2008) (finding  
17 no duty to disclose where plaintiff's allegations did not specify any facts  
18 substantiating the alleged fraud); *see also Hovsepian v. Apple, Inc.*, No. 08-5788, 2009  
19 WL 5069144, at \*5 (N.D. Cal. Dec. 17, 2009) (12(b)(6) dismissal of fraudulent  
20 omission claim where the complaint failed to describe with specificity representations  
21 made by defendant with respect to the allegedly defective product).

22         Accordingly, Plaintiffs' FAL, CLRA, and fraudulent concealment claims  
23 should be dismissed in their entirety in addition to the UCL prong grounded in fraud  
24 and unfairness. *See In re Actimmune*, 2009 WL 3740648, at \*14, \*16 (dismissing  
25 UCL claims under the fraud and unfairness prongs that were based on allegations of  
26 fraud that fell short of Rule 9(b)'s standards). *Gertz v. Toyota Motor Corp.*, *supra*  
27 (same).

2. *Plaintiffs Have Not Sufficiently Alleged a Violation of California False Advertising Law § 17500, et seq.*

To state a claim for violation of California False Advertising Law pursuant to Cal. Bus. & Prof. Code § 17500, *et seq.*, Plaintiffs must allege that “members of the public are likely to be deceived” by false or misleading statements. *In re Tobacco II*, 46 Cal. 4th at 312; *see also* Cal. Bus. & Prof. Code § 17500, *et seq.* “The term ‘likely’ means probable, not just possible.” *McKinniss v. Gen. Mills, Inc.*, No. CV 07-2521, 2007 WL 4762172, at \*2 (C.D. Cal. Sept. 18, 2007) (internal citation omitted). If an alleged misrepresentation would not deceive a reasonable person, then a FAL claim may be dismissed on a Rule 12(b)(6) motion to dismiss. *See Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (granting 12(b)(6) dismissal after deciding that “no reasonable consumer could be misled” by defendants’ alleged misrepresentations).

The MCC details a litany of statements allegedly made by Toyota in various press releases, annual reports, brochures, manuals, advertisements, and press kits. (MCC, ¶¶ 81-105). The alleged misrepresentations and omissions identified by Plaintiffs in the MCC are generalized statements concerning the quality and safety of Toyota vehicles. (*Id.*). Plaintiffs fail to identify a single representation made by Toyota that is likely to deceive a reasonable consumer.

It is well-established that generalized statements asserting claims of quality and safety are non-actionable. *See Glen Holly Entm’t Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir. 2003) (affirming 12(b)(6) dismissal of claims that were “generalized, vague and unspecific assertions” as non-actionable puffery); *see also Stearns v. Select Comfort Retail Corp.*, No. 08-2746-JF, 2009 WL 1635931, at \*16 (N.D. Cal. June 5, 2009) (holding that statements about a product’s reliability, maintenance, and comfort are non-actionable “because they are generalized assertions and not easily verifiable as fact”).

In support of their FAL claim, Plaintiffs identify such generalized statements

1 as: the Toyota Camry has become the “platinum standard” (MCC, ¶ 84); the Sienna  
2 has “more safety” (*Id.*, ¶ 90); the Toyota 4Runner “utilizes the latest technology to  
3 deliver a high level of occupant safety” (*Id.*, ¶ 92); “Safety First to Last” (*Id.*); the  
4 Lexus delivers “real benefits to owners in terms of safety, performance, comfort and  
5 convenience” (*Id.*); “driving safety is just as high a priority in our full line of SUVs”  
6 (*Id.*); and “RAV4 still holds the ultimate advantage with Toyota quality.” (*Id.*, ¶ 95).  
7 These statements clearly cannot form the basis of a FAL claim, as a matter of law.  
8 *See Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 973 (N.D. Cal. 2008)  
9 (granting 12(b)(6) dismissal of FAL claim where statements of product superiority  
10 “such as ‘superb, uncompromising quality’ and ‘faster, more powerful, and more  
11 innovative...’” were deemed non-actionable puffery); *Fraker v. KFC Corp.*, No. 06-  
12 CV-01284, 2007 WL 1296571, at \*2-\*3 (S.D. Cal. Apr. 30, 2007) (granting 12(b)(6)  
13 dismissal of FAL claim where “[n]o reasonable consumer” would reply upon claims  
14 of “‘highest quality,’” “‘best,’” or “‘balanced’” as “‘specific representations as to  
15 health, quality, or safety’”). These generalized statements attributed to Toyota are not  
16 actionable as a matter of law and Plaintiffs’ claims are therefore subject to dismissal.

17 3. *Plaintiffs Have Not Sufficiently Alleged a Violation of California’s*  
18 *CLRA.*

19 a. Plaintiffs Fail to Plead a Duty to Disclose Material Facts  
20 Under the CLRA.

21 Under the CLRA, a failure to disclose a defect is actionable if it is “‘contrary to  
22 a representation actually made by the defendant,’ [or an omission of] ‘a fact the  
23 defendant was obligated to disclose.’” *Oestreicher*, 544 F. Supp. 2d at 969 (quoting  
24 *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 835, 51 Cal. Rptr. 3d 118  
25 (2006)); *see also Hoey v. Sony Elecs.*, 515 F. Supp. 2d 1099, 1103 (N.D. Cal. 2007).  
26 A duty to disclose is created in four circumstances: “(1) when the defendant is in a  
27 fiduciary relationship with the plaintiff; (2) when the defendant had exclusive  
28 knowledge of material facts not known to the plaintiff; (3) when the defendant

1 actively conceals a material fact from the plaintiff; and (4) when the defendant makes  
2 partial representations but also suppresses some material fact.” *Oestreicher*, 544 F.  
3 Supp. 2d at 970-971 (internal citation omitted). Absent a fiduciary relationship  
4 between plaintiff and defendant, the non-disclosed information must be “material” in  
5 order to give rise to any duty to disclose. In order for the information to be considered  
6 material, a plaintiff must show that, had a “reasonable consumer” been aware of the  
7 information, the consumer would have behaved differently. *Consumer Advocates v.*  
8 *Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1360, 8 Cal. Rptr. 3d 22, 29 (2003).  
9 Generalized allegations that plaintiffs would have behaved differently had they known  
10 of the defects are not sufficient, and not all defects are material facts. *See Oestreicher*,  
11 544 F. Supp. 2d at 971, 972.

12 Plaintiffs’ CLRA claim is improperly based on generalized statements that the  
13 alleged risk of throttle control failure and alleged lack of adequate fail-safe  
14 mechanisms in vehicles containing ETCS are material facts, which Toyota had a duty  
15 to disclose but failed to do so. (*See* MCC, ¶ 300). Plaintiffs’ allegations are deficient  
16 because they do not identify any specific material facts, namely any specific defect,  
17 that Toyota had a duty to disclose. As discussed above, Plaintiffs only allege in a  
18 conclusory manner that Toyota “made numerous material statements about the safety  
19 and reliability” of the vehicles that were false or misleading, which contributed to the  
20 “deceptive context” of their advertising and representations. (*Id.*, ¶ 301). These  
21 generalized assertions concerning “safety” are not, as a matter of law, material  
22 statements that give rise to a duty to disclose. *See Tietsworth v. Sears, Roebuck &*  
23 *Co.*, 09-CV-00288, 2009 WL 3320486, at \*4 (N.D. Cal. Oct. 13, 2009) (rejecting  
24 plaintiff’s argument that statements made about a product’s quality and dependability  
25 generally constituted a representation about the product’s allegedly defective  
26 electronic control boards). Accordingly, Plaintiffs fail to allege any material facts that  
27 Toyota had a duty to disclose concerning its ETCS-i and their CLRA claim fails as a  
28 matter of law.



b. Plaintiffs Failed to Provide the Requisite Notice Under the CLRA, Thus Their Claim for Damages Must Be Stricken.

A plaintiff seeking damages based on a CLRA claim, including on behalf of a class, is required to provide notice to the defendant of the alleged statutory violation and a demand to rectify the violation. Cal. Civ. Code § 1782(a). This notice must be in writing and sent to the place where the transaction occurred or to the defendant's principal place of business, not less than 30 days before the plaintiff files any claim for damages under the CLRA. *Id.* at § 1782(a)(2). "This requirement exists in order to allow a defendant to avoid liability for damages if the defendant corrects the alleged wrongs within 30 days after notice, or indicates within that 30-day period that it will correct those wrongs within a reasonable time." *Doe 1 v. AOL, LLC*, No. C 06-5866, 2010 WL 2524494, at \*6 (N.D. Cal. June 22, 2010) (quotations omitted); *see Morgan v. AT&T Wireless Servs., Inc.*, 177 Cal. App. 4th 1235, 1259-60, 99 Cal. Rptr. 3d 768, 788-89 (2009).

Nothing other than strict compliance with the notice requirement will effectuate the intent of the CLRA. *Outboard Marine Corp. v. Super. Ct. of Sacramento Cnty.*, 52 Cal. App. 3d 30, 41, 124 Cal. Rptr. 852, 859 (1975). Thus, compliance with the notice requirements is necessary to recover damages under the CLRA. *Davis v. Chase Bank U.S.A., N.A.*, 650 F. Supp. 2d 1073, 1089 (C.D. Cal. 2009). If a plaintiff fails to strictly adhere to the notice requirement, the claim will be dismissed with prejudice under Rule 12(b)(6). *Id.*

In paragraph 309 of the MCC, Plaintiffs assert that "numerous" CLRA notice letters have been sent to Toyota in accordance with Cal. Civ. Code § 1782, including notice letters dated November 24, 2009, March 23, 2010, and June 4, 2010. (MCC, ¶ 309). However, with the exception of the June 4th letter that was sent to TMS on behalf of 17 Consumer Plaintiffs, *see* Gilford Decl. ¶ 6 & Ex. E, Plaintiffs do not properly allege compliance with the CLRA pre-litigation notification requirements. Specifically, the November 24 and March 23 letters referenced in the MCC were both



1 sent to Toyota on behalf of plaintiffs who are not named class representatives in this  
2 MDL proceeding and who did not themselves comply with the CLRA notice  
3 requirements. (*See id.* ¶¶ 3, 4 & Exs. B and C (Nov. 24, 2009 letter<sup>13</sup>; Mar. 24, 2010  
4 letter<sup>14</sup>). Additionally, the MCC does not sufficiently allege that any of the 52 named  
5 Plaintiffs satisfied the pre-litigation notice requirements with respect to TMC.

6 Accordingly, the majority of named Plaintiffs have failed to establish proper  
7 notice to Toyota as required by Cal. Civ. Code § 1782 and therefore, their request for  
8 damages under the CLRA claim must be dismissed or stricken.

9 4. *Plaintiffs Fail to State a Claim for Fraud by Concealment as a*  
10 *Matter of Law.*

11 To state a claim for fraudulent concealment, a plaintiff must plead: “(1) the  
12 defendant must have concealed or suppressed a material fact, (2) the defendant must  
13 have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have  
14 intentionally concealed or suppressed the fact with the intent to defraud the plaintiff,  
15 (4) the plaintiff must have been unaware of the fact and would not have acted as he  
16 did if he had known of the concealed or suppressed fact, and (5) as a result of the  
17 concealment or suppression of the fact, the plaintiff must have sustained damage.”  
18 *Gonzalez v. EJ Mortg., Inc.*, No. 09-cv-2812, 2010 WL 1996609, at \*2 (S.D. Cal. May  
19 17, 2010) (quoting *Mktg. W., Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603,  
20 612-13, 7 Cal. Rptr. 2d 859 (1992)) (internal quotations omitted).

21  
22  
23 <sup>13</sup> The November 24 letter was sent on behalf of Eric Kmetz and Joe Morris, neither  
24 of whom are named Plaintiffs in the MCC, in connection with the action, *Kmetz and*  
25 *Morris v. Toyota Motor Sales, U.S.A., Inc., et al.*, CV 09-8478 (C.D. Cal.). *Id.* ¶ 4 &  
Ex. C. There, Messrs. Kmetz and Morris failed to comply with the CLRA notice  
requirements, because the letter was sent one week after the lawsuit was filed. (*Id.*).

26 <sup>14</sup> Similarly, the March 24 letter was sent on behalf of Anita Jorge, who is not a  
27 named Plaintiff in the MCC, in connection with the action, *Jorge v. Toyota Motor N.*  
28 *Am., Inc., et al.*, 10-CV-00060 (E.D. Ky.). *Id.* ¶ 5 & Ex. D. There, Ms. Jorge likewise  
failed to comply with the CLRA notice requirements, because the letter was sent on  
the same day that the lawsuit was filed. (*Id.*).

a. Plaintiffs Fail to Plead Concealment or Suppression of a Material Fact.

Plaintiffs' fraud by concealment claim (Count IX) is based upon an allegation that Toyota "concealed and/or suppressed material facts concerning the safety of their vehicles." (MCC, ¶ 398). Plaintiffs assert that Toyota failed to disclose alleged defects with the ETCS-i; failed to disclose internal reports concerning alleged incidents of UA; failed to disclose the "real reason" for various recalls implemented from 2002-2009, including the floor mat and sticky pedal recalls; and failed to affirmatively issue any safety advisories to consumers concerning sticky pedals. (*Id.*). Although Plaintiffs allege that such assertions constitute material facts because "they directly impact the safety of the Defective Vehicles," (*id.*, ¶ 400), these are nothing more than conclusory statements predicated on Plaintiffs' unsupported theory that Toyota vehicles containing ETCS-i are defective. Plaintiffs allege no facts warranting such an inference and fail to identify any alleged representations or omissions by Toyota that could serve as the basis for such claims. Therefore, Plaintiffs fail to sufficiently plead concealment or suppression of a material fact. *See Oestreicher*, 544 F. Supp. 2d at 974 (granting 12(b)(6) dismissal of fraud by concealment claim where plaintiffs failed to plead with specificity); *Stearns*, 2009 WL 1635931, at \*9 (granting 12(b)(6) dismissal where plaintiff's conclusory allegations did not come close to satisfying the pleading requirements of Rule 9(b)); *In re Hydroxycut Mktg. & Sales Practices Litig.*, No. 09-md-2087, 2010 WL 2232151, at \*4 (S.D. Cal. June 3, 2010) (granting 12(b)(6) dismissal of fraud by concealment claim where plaintiff's allegations amounted to "conclusory rather than factual statements").

b. Plaintiffs Cannot Establish a Duty to Disclose.

In addition, Plaintiffs have not and cannot show that Toyota had a duty to disclose. A duty to disclose arises under four circumstances: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant

1 actively conceals a material fact from the plaintiff; and (4) when the defendant makes  
2 partial representations but also suppresses some material facts. *Sanders v. Apple, Inc.*,  
3 672 F. Supp. 2d 978, 986 (N.D. Cal. 2009) (citing *LiMandri v. Judkins*, 52 Cal. App.  
4 4th 326, 337 (1997)).

5 The MCC alleges a duty to disclose arising under the second, third and fourth  
6 conditions. (See MCC, ¶¶ 399-401). With regard to the second condition, Plaintiffs  
7 claim that Toyota “possessed exclusive knowledge of the defects rendering Defective  
8 Vehicles inherently more dangerous and unreliable than similar vehicles.” (*Id.*, ¶  
9 400). With regard to the third condition, Plaintiffs allege that Toyota “actively  
10 concealed and/or suppressed these material facts, in whole or in part, with the intent to  
11 induce Plaintiffs and the Class to purchase Defective Vehicles at a higher price for the  
12 vehicles, which did not match the vehicles’ true value.” (*Id.*, ¶ 401). With regard to  
13 the fourth condition, Plaintiffs assert that Toyota had a duty to disclose the alleged  
14 omissions detailed in paragraph 398, because they “consistently marketed their  
15 vehicles as safe and proclaimed that safety is one of Toyota’s highest corporate  
16 priorities.” (*Id.*, ¶ 399).

17 As explained above, irrespective of whether Toyota has marketed its vehicles as  
18 safe, Plaintiffs’ fraud by concealment claim is based upon Toyota’s alleged  
19 concealment of ETCS-i defects. However, with regard to the second and third  
20 conditions set forth above, Plaintiffs have failed to specify any factual basis to support  
21 their conclusions that Toyota had “exclusive knowledge” of the alleged ETCS-i  
22 defects or that they “actively concealed and/or suppressed” such information to induce  
23 Plaintiffs to purchase their vehicles. (See MCC, ¶¶ 400-01). As the *Oestreicher* court  
24 noted, “allegations of this nature ... could be made about any alleged design defect in  
25 any manufactured product. The heightened pleading requirements of Rule 9(b) were  
26 designed to avoid exactly this situation.” *Oestreicher*, 544 F. Supp. 2d at 974 (finding  
27 no duty to disclose where plaintiff’s allegations did not specify any facts  
28 substantiating the alleged fraud); see also *Hovsepien v. Apple, Inc.*, No. 08-5788, 2009

1 WL 5069144, at \*5 (N.D. Cal. Dec. 17, 2009) (12(b)(6) dismissal of fraudulent  
2 omission claim where the complaint failed to describe with specificity representations  
3 made by defendant with respect to the allegedly defective product); *Gertz v. Toyota*  
4 *Motor Corp., supra* (claims based on alleged fraudulent omissions are dismissed  
5 based on failure to satisfy Rule 9(b)). Hence, Plaintiffs' duty to disclose arguments  
6 related to the second and third conditions are unavailing.

7 Similarly, Plaintiffs' fourth condition argument fails because Plaintiffs do not  
8 identify, with the requisite degree of particularity required under Rule 9(b), any partial  
9 representations made by Toyota concerning ETCS-i that would give rise to a duty to  
10 disclose. The MCC merely alludes to unspecified "representations to the public about  
11 safety." (MCC, ¶ 399). These generalized assertions concerning "safety" do not give  
12 rise to a duty to disclose as a matter of law. *See Tietsworth v. Sears, Roebuck and*  
13 *Co.*, 09-CV-00288, 2009 WL 3320486, at \*4 (N.D. Cal. Oct. 13, 2009) (rejecting  
14 plaintiff's argument that statements made about a product's quality and dependability  
15 generally constituted a representation about the product's allegedly defective  
16 electronic control boards); *Sanders*, 672 F. Supp. 2d at 986 (dismissing a 12(b)(6)  
17 fraud by concealment claim where plaintiff failed "to describe with specificity  
18 representations made by [defendant] with respect to the display's component parts that  
19 would give rise to a duty to disclose, how he relied on such partial disclosures, or the  
20 manner in which such representations or omissions were false and misleading"); *Hoey*  
21 *v. Sony Elecs., Inc.*, 515 F. Supp. 2d 1099, 1105 (N.D. Cal. 2007) (dismissing a  
22 fraudulent concealment claim where the complaint failed to identify a representation  
23 by defendant contrary to the alleged concealment).

24 Accordingly, Plaintiffs cannot satisfy the duty to disclose requirement for a  
25 valid fraud by concealment claim.

1           **F.     Plaintiffs Fail to State Claims for Breach of Express Warranty.**<sup>15</sup>

2                 1.     *Plaintiffs Have Failed to Plead the Existence of Valid Warranties.*

3           Plaintiffs' breach of express warranty claim (Count IV), brought pursuant to  
4 Cal. Com. Code § 2313, cannot stand because they have failed to allege "(1) the exact  
5 terms of the warranty; [and] (2) reasonable reliance thereon..." *Tietsworth v. Sears*,  
6 No. 5:09-cv-00288, 2010 WL 1268093, at \*13 (N.D. Cal. Mar. 21, 2010); *see also*  
7 *Stearns v. Select Comfort Retail Corp.*, No. 08-2746, 2009 WL 1635931, at \*9 (N.D.  
8 Cal. Jun. 5, 2009) ("Such a claim must describe the exact terms of the warranty, allege  
9 that [the] buyer reasonably relied on those terms, and that the breach of warranty was  
10 the proximate cause of the buyer's injury."); *Gertz v. Toyota Motor Corp.*, *supra*  
11 ("Plaintiff has failed to allege that she saw any of the statements at issue prior to  
12 acquiring her Prius"). An express warranty is ordinarily made at the time the product  
13 is purchased. *See* Cal. Com. Code § 2313.

14           Plaintiffs have looked everywhere for language to support a warranty claim  
15 except Toyota's actual, express warranty. For instance, Plaintiffs refer to alleged  
16 warranty language but they fail to allege that this language was ever disseminated to  
17 customers; in fact, the referenced language is nowhere to be found within the text of  
18 Toyota's express warranty. *Compare* MCC, ¶ 342 *with*, Gilford Decl. Ex. B,  
19 Warranty Manuals, at 25, 108, 182. Such language, therefore, cannot serve as the  
20 basis for any breach of warranty claim.

21           Similarly, alleged statements concerning the "characteristics and qualities" of  
22 Toyota vehicles made in advertisements, e-brochures, and other materials cannot serve  
23 as the basis of an express warranty claim. (MCC, ¶ 344-45). None of these  
24 statements are sufficiently definite to create an express warranty, which can only be  
25

26           <sup>15</sup> It is presumed that Plaintiff Auto Lenders is not asserting the express warranty  
27 claim set forth in Count IV, as it is a residual value insurer that has never owned or  
28 leased Toyota vehicles. If Auto Lenders does assert an express warranty claim, it fails  
for each of the reasons discussed in this section.



1 created by a specific and unequivocal representation of fact about the product. *See*  
2 *Johnson v. Mitsubishi Digital Elecs. Am., Inc.*, 578 F. Supp. 2d 1229, 1236 (C.D. Cal.  
3 2008) (stating that to create an express warranty, the seller must make representations  
4 or promises with sufficient specificity); *Keith v. Buchanan*, 173 Cal. App. 3d 13, 21  
5 (1985). Moreover, as previously addressed, *supra* E.3, such statements concerning the  
6 quality and safety of Toyota vehicles are non-actionable puffery, and therefore, cannot  
7 serve as the basis of any express warranty claim.

8           2. *Plaintiffs Have Failed to Sufficiently Plead a Breach of Warranty*  
9           *Claim Based on Failure to "Repair or Adjust."*

10           The only warranty in existence and relevant to Plaintiffs' claims is the basic  
11 warranty contained in Toyota's Warranty Manual, which expressly provides:

12           **WHAT IS COVERED AND HOW LONG**

13           **Basic Warranty:** This warranty covers repairs and adjustments needed  
14 to correct defects in material or workmanship of any part supplied by  
15 Toyota, subject to the exceptions indicated under "What is Not Covered"  
16 on pages 13-14. ...

17           **Limitations:** The performance of necessary repairs and adjustments is  
18 the exclusive remedy under these warranties or any implied warranties.

19           ...

20           *See* Gilford Decl., Ex. B, Warranty Manuals, at 24-25, 108-109, 182-183.<sup>16</sup>

21           Consistent with Cal. Com. Code § 2719(1)(a), Toyota's Warranty Manual  
22 unambiguously limits a buyer's remedy to repair or adjustment needed for any defects  
23 in material or workmanship of any part supplied by Toyota. In an effort to circumvent  
24 this limitation, Plaintiffs baldly assert that "Toyota has not repaired or adjusted, and  
25

26 <sup>16</sup> Plaintiffs cannot maintain a breach of express warranty claim against TMC,  
27 because TMS is the sole warrantor under the Warranty Manual. *See id.*, Ex. B,  
28 Warranty Manuals, at 24, 105, 178 ("[t]he warrantor for these limited warranties is  
Toyota Motor Sales, U.S.A., Inc"). *See Ackerman v. A. Levy & J. Zentner Co.*, 7 Cal.  
App. 2d 23, 25, 45 P.2d 386 (1935) (express warranties are contractual in nature).



1 has been unable to repair or adjust, the Vehicles' materials and workmanship defects"  
2 without providing any factual basis for such allegations. (MCC, ¶ 343). In fact, this  
3 assertion is contradicted by the MCC itself. With respect to 12 Consumer Plaintiffs  
4 named as class representatives, these Plaintiffs concede that their vehicles were  
5 tendered, repaired, and no UA event has occurred subsequent to the repairs. *See*  
6 Gilford Decl. Ex. A-3, ("Grp. 2 Pls."). For the remaining named Plaintiffs, the MCC  
7 is entirely devoid of any allegation indicating that they presented their vehicles for  
8 repairs. *See id.* Ex. A-4, ("Grp. 3 Pls."). Therefore, in the absence of any factual  
9 allegations to support their conclusory assertions, Plaintiffs' express warranty claim  
10 based on failure to repair or adjust must fail as a matter of law. *Gertz v. Toyota Motor*  
11 *Corp., supra* (court rejects warranty claim where "there is no allegation that [Toyota]  
12 ever refused or attempted without success to repair or adjust her Prius").

13 3. *Plaintiffs' Alleged Design Defect Does Not Fall Within the Scope*  
14 *of the Express Warranty in Toyota's Warranty Manual.*

15 Despite their efforts to disguise the issues, the crux of Plaintiffs' express  
16 warranty claim is based upon their belief that all of Toyota's ETCS-i vehicles suffer  
17 from a **design** defect. (*See, e.g.*, MCC, ¶¶ 245, 346-47, 351). Specifically, Plaintiffs  
18 allege that the ETCS-i systems in Toyota vehicles are defectively designed and that  
19 Toyota can remedy this alleged design flaw by implementing electronic and  
20 mechanical fail-safes. (*See id.*, ¶¶ 110-11, 123). Plaintiffs then attempt to  
21 characterize these allegations of product design defect as defects in "materials and  
22 workmanship." (*Id.*, ¶ 343). However, no amount of guileful drafting can overcome  
23 the obvious fact that in the MCC, Plaintiffs are complaining of a design defect, not  
24 defects in materials and workmanship. Because it is well-settled that warranties  
25 concerning "material and workmanship" do not cover claims of design defect,  
26 Plaintiffs' express warranty fails as a matter of law. *See, e.g., Brothers v. Hewlett-*  
27 *Packard Co.*, No. C-06-02254, 2007 WL 485979, at \*4 (N.D. Cal. Feb. 12, 2007)  
28 (dismissing express warranty claim where the warranty "does not guarantee against

1 design defects [but] guarantees against defects in materials and workmanship.”);  
2 *Grupo Sistemas Integrales de Telecomunicacion S.A. de C.V. v. AT&T Commc'ns,*  
3 *Inc.*, No. 92 CIV. 7862, 1996 WL 312535, at \*7 (S.D.N.Y. June 10, 1996) (“[I]n  
4 limiting its warranty to claims based on defective materials or workmanship, Article 5  
5 excludes claims of *design defect*....”); *Consol. Data Terminals v. Applied Digital*  
6 *Data Sys., Inc.*, 512 F. Supp. 581, 586 (N.D. Cal. 1981) (recognizing difference  
7 between material and workmanship defects and design defects) *aff'd in part, rev'd in*  
8 *part*, 708 F.2d 385 (9th Cir. 1983); *Falcon Tankers, Inc. v. Litton Sys., Inc.*, 300 A.2d  
9 231, 238 (Del. Super. Ct. 1972) (“[C]ourts have repeatedly refused to extend so-called  
10 workmanship and material guarantees to cover defects in design.”).

11 4. *Plaintiffs' Request for Damages Is Improper Because Repair or*  
12 *Adjustment Is the Exclusive Remedy Available Under Toyota's*  
13 *Warranty Manual.*

14 Although Plaintiffs seek damages among other relief, (MCC, ¶¶ 350-54),  
15 “repair or adjustment” is the exclusive remedy under the Warranty Manual. Thus, no  
16 other remedy, including damages, is available. *Gertz v. Toyota Motor Corp., supra*  
17 (“The Court also agrees with [Toyota] that, even if Plaintiffs sufficiently alleges  
18 breach of the Basic Warranty, Plaintiff’s remedy on that claim is limited to repair or  
19 adjustment – damages are not available”); *see also* Cal. Com. Code § 2719(1)(b)  
20 (Where an express warranty contains a limitation of remedies, the limited remedy is  
21 optional unless the remedy expressly provides that it is exclusive, “in which case it is  
22 the sole remedy.”) Here, the plain language of the Warranty Manual makes clear that  
23 the “exclusive remedy” available under the warranty is “repair or adjustment.”  
24 Gilford Decl., Ex. B, Warranty Manuals, at 24, 107, 180.

25 Plaintiffs attempt to circumvent this limitation by alleging that the repair or  
26 adjustment remedy fails its essential purpose. (MCC, ¶¶ 349, 353). However, this  
27 argument is available only where a plaintiff first gives the warrantor an opportunity to  
28 repair and the warrantor refuses or fails to do so. *See Philippine Nat'l Oil Co. v.*

1 *Garrett Corp.*, 724 F.2d 803, 808 (9th Cir. 1984) (“[T]he law is that a repair or replace  
2 remedy fails of its essential purpose only if repeated repair attempts are unsuccessful  
3 *within a reasonable time.*”); *see also Stearns v. Select Comfort Retail Corp.*, No. 08-  
4 2746, 2009 WL 1635931, at \*4 n.4 (N.D. Cal. June 5, 2009) (holding that  
5 “defendant’s warranty did not fail of its essential purpose because defendant was not  
6 allowed the opportunity to repair the engine”) (internal citation omitted).

7 As noted above, only twelve Plaintiffs allege that they ever presented their  
8 vehicles for repair. *See* Gilford Decl. Ex. A-3, (“Grp. 2 Pls.”). Moreover, the MCC  
9 contains only conclusory allegations that Toyota failed to repair or adjust within a  
10 reasonable time without pleading any facts to support this assertion. (*See* MCC, ¶¶  
11 349, 353). Absent any factual allegations that their vehicles were presented for repairs  
12 or adjustments, Plaintiffs cannot claim that the warranty fails of its essential purpose,  
13 as a matter of law. *See Philippine Nat’l Oil Co.*, 724 F.2d at 808.

14 Plaintiffs also try to avoid the warranty limitation by arguing that the warranty  
15 is procedurally and substantively unconscionable. (*See* MCC, ¶¶ 347-348, 351-352);  
16 *see also* Cal. Com. Code § 2719(3). Before a court will find a contract provision  
17 unconscionable, there must be *both* procedural and substantive unconscionability.  
18 *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 808, 49 Cal. Rptr. 3d 555, (2007)  
19 (“Unconscionability is a question of law for the court.”). Procedural  
20 unconscionability focuses on inequality of bargaining power and surprise resulting  
21 from hidden terms. *Tietzworth v. Sears*, No. 5:09-cv-00288, 2010 WL 1268093, at  
22 \*11 (N.D. Cal. Mar. 21, 2010). With respect to this procedural element, Plaintiffs  
23 allege that the Warranty Manual is unconscionable because it is an adhesion contract  
24 and Plaintiffs “do not have any meaningful choices of reasonably available alternative  
25 sources of suitable vehicles.” (*See* MCC, ¶ 348). Yet “a contract of adhesion is fully  
26 enforceable according to its terms unless certain other factors are present  
27 which...operate to render it otherwise.” *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807,  
28 819-20, 171 Cal. Rptr. 604, (1990) (*en banc*) (internal citations omitted). Despite

1 Plaintiffs' bald assertion that they did not have any alternatives, it is clear that there  
2 were thousands of other vehicles available for purchase in the marketplace. This is  
3 precisely the sort of implausible allegation that does not withstand scrutiny under  
4 *Iqbal*. See, e.g., *Sw. Eng'g, Inc. v. Yeomans Chicago Corp.*, No. 09-cv-110, 2009 WL  
5 3720374, at \*6 (S.D. Cal. Nov. 3, 2009) (applying *Iqbal* and dismissing  
6 unconscionability allegations).

7 Plaintiffs also fail to allege facts sufficient to show that the warranty is  
8 substantively unconscionable. A contract is substantively unconscionable if it creates  
9 "'overly harsh' or 'one-sided' results as to 'shock the conscience.'" *Aron*, 143 Cal.  
10 App. 4th at 808. The contract need not be reasonable; the determining factor is  
11 whether it "shocks the conscience." *Id.* at 809. Again, Plaintiffs allege a "formulaic  
12 recitation of the elements." (MCC, ¶ 352); *Iqbal*, 129 S. Ct. at 1349. However, these  
13 "'naked assertion[s]' devoid of 'further factual enhancement'" do not suffice and  
14 Plaintiffs' unconscionability argument cannot survive a motion to dismiss. *Id.*

15 Accordingly, Plaintiffs' request for damages must be stricken.

16 5. *Numerous Class Representatives Fail to Meet Other Requirements*  
17 *For a Valid Express Warranty Claim.*

18 a. Certain Plaintiffs Have Failed to Present Their Vehicle for  
19 Repair During the Warranty Period, as Required.

20 Nine Consumer Plaintiffs do not plead that they reported any alleged defects or  
21 presented their vehicles for repairs within the warranty period and therefore, have  
22 failed to comply with the terms of the Warranty Manual. (See MCC, ¶ 39, 40, 47, 58,  
23 59, 64, 65).<sup>17</sup> Unlike a warranty of future performance, which expressly guarantees  
24 that a product will perform in the future as promised, a repair warranty "simply  
25 provides that if a product fails or becomes defective, the seller will replace or repair  
26

27 <sup>17</sup> The named Plaintiffs at issue include Plaintiffs D. and A. Caylor, Chambers,  
28 Funez, Nyquist, Perkin, J. and T. Seymour and Tucker.

1 within a stated period.” *Ontario Hydro v. Zallea Sys., Inc.*, 569 F. Supp. 1261, 1266  
2 (D. Del. 1983); *see also Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824,  
3 830 (2006) (quoting *Abraham v. Volkswagen of Am., Inc.* 795 F.2d 238, 250 (2d Cir.  
4 1986) (“The general rule is that an express warranty does not cover repairs made after  
5 the applicable time or mileage period have elapsed.”)).

6 b. Certain Plaintiffs Have Not Tendered Their Vehicles Which  
7 Is a Condition Precedent.

8 For those Plaintiffs still within their warranty period, compliance with the  
9 tender requirement is necessary prior to filing a lawsuit for breach of express  
10 warranty. As noted above (*see supra* in Section F.2), many of the named Plaintiffs  
11 have not even tendered their vehicles for repair in accordance with the Warranty  
12 Manual. *See* Gilford Decl. Ex. A-4; *see also id.* Ex. B, Warranty Manuals, at 44, 126,  
13 200 (“To obtain warranty service...take your vehicle to an authorized Toyota  
14 dealership.”).

15 The customer’s obligation to tender an allegedly defective vehicle is a condition  
16 precedent to any obligation to repair or adjust the allegedly defective parts. Here, the  
17 vast majority of Consumer Plaintiffs (and all of the applicable Non-Consumer  
18 Plaintiffs) have failed to allege that they satisfied this condition precedent. *See*  
19 Gilford Decl. Ex. A-4, (“Grp. 3 Pls.”). Thus, they cannot pursue a claim for breach of  
20 express warranty. *See* Cal. Civ. Code § 1639; *Applications, Inc. v. Hewlett-Packard,*  
21 *Co.*, 501 F. Supp. 129 (S.D.N.Y. 1980) (applying California law and explaining that a  
22 party seeking to enforce an express warranty is bound by its terms).

23 c. Certain Plaintiffs Have Failed to Provide the Requisite Pre-  
24 Suit Notice.

25 Additionally, 25 Plaintiffs named in the MCC have failed to allege that they  
26 provided the requisite pre-litigation notice prior to filing suit. *See* Gilford Decl. Ex.  
27 A-5, (“Grp. 4 Pls.”). Under California law, a buyer must provide notice of an alleged  
28 breach of warranty as a precondition to litigation. *See Fieldstone Co. v. Briggs*



1 *Plumbing Prods. Inc.*, 54 Cal. App. 4th 357, 62 Cal. Rptr. 2d 701, 708-09 (1997)  
2 (holding that failure to provide such notice serves as a bar to suit). Failure to allege  
3 pre-litigation notice requires dismissal of an action under California law. *See*  
4 *Tietsworth*, 2010 WL 1268093, at \*13 (citing Cal. Com. Code § 2607) (“A plaintiff  
5 also must plead that she provided the defendant with pre-suit notice of the breach”);  
6 *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 986 (N.D. Cal. 2009). Simply filing a  
7 complaint is insufficient to meet the notice requirement of Section 607. *See Cardinal*  
8 *Health 301, Inc. v. Tyco Elec. Corp.*, 169 Cal. App. 4th 116, 135-36, 87 Cal. Rptr. 3d  
9 5 (2008).

10 Because these 25 Plaintiffs fail to allege that they provided pre-suit notice, their  
11 express and implied warranty claims must be dismissed.

12 **G. Plaintiffs Fail to State a Claim for Breach of Implied Warranty of**  
13 **Merchantability.**

14 1. *The Requisite Privity Does Not Exist Between Plaintiffs and*  
15 *Toyota.*

16 Plaintiffs’ implied warranty of merchantability claim (Count V) brought under  
17 Cal. Com. Code § 2314 must be dismissed, because Plaintiffs cannot establish vertical  
18 privity as a matter of law. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,  
19 1023 (9th Cir. 2008) (“a plaintiff asserting breach of warranty claims *must* stand in  
20 vertical contractual privity with the defendant”) (emphasis added); *Anunziato v.*  
21 *eMachines, Inc.*, 402 F. Supp. 2d 1133, 1141 (C.D. Cal. 2005) (Selna, J.) (dismissing  
22 implied warranty claim where plaintiff “did not, and [could not] allege privity” with  
23 defendant). In the absence of privity, a plaintiff is barred from bringing an implied  
24 warranty claim under California law. *See All W. Elecs., Inc. v. M-B-W, Inc.*, 64 Cal.  
25 App. 4th 717, 725, 75 Cal. Rptr. 2d 509, 514 (1998) (“Privity of contract is a  
26 prerequisite in California for recovery on a theory of breach of implied warranties of  
27 fitness and merchantability.”).

28 “California courts have painstakingly established the scope of the privity



1 requirement under California Commercial Code section 2314.” *Clemens*, 534 F.3d at  
2 1024. Vertical privity generally requires a direct contractual nexus between plaintiff  
3 and defendant for a valid claim of breach of implied warranty. *Osborne v. Subaru of*  
4 *Am., Inc.*, 198 Cal. App. 3d 646, 656, 243 Cal. Rptr. 815 n.6 (1988). If a purchaser  
5 seeks warranty recovery “against a manufacturer with whom he has no direct  
6 contractual nexus,” the manufacturer has a vertical privity defense. *Anunziato*, 402 F.  
7 Supp. 2d at 1141 (internal citation omitted).

8 With respect to the threshold privity requirement, Plaintiffs assert only that they  
9 had “direct dealings with either the Defendants or their agents (dealerships)” without  
10 alleging any facts to support these claims. (MCC, ¶ 363). Plaintiffs do not allege that  
11 they purchased or leased their vehicles from Toyota, nor do they allege any facts to  
12 suggest any direct dealings with Toyota. (*Id.*, ¶¶ 357-364). Likewise, Plaintiffs have  
13 failed to plead any facts indicating that the dealerships are agents of Toyota. As  
14 previously addressed before this Court in connection with the preservation order  
15 briefing, the dealerships are independent, third-party entities that are not agents of  
16 Toyota. (Dkt. 205). Plaintiffs’ bald assertion to the contrary is not supported by a  
17 single factual allegation in the MCC and instead, is expressly contradicted by well-  
18 established case law. *See Clemens*, 534 F.3d 1017 at 1023 (affirming dismissal of  
19 implied warranty claim where plaintiff purchased vehicle from dealer, explaining that  
20 consumer who purchases from retailer is not in privity with manufacturer); *All W.*  
21 *Elecs.*, 64 Cal. App. 4th at 725 (“[T]here is no privity between the original seller and a  
22 subsequent purchaser who is in no way a party to the original sale.”); *see also*  
23 *Anunziato*, 402 F. Supp. 2d at 1142 (dismissing implied warranty claim for lack of  
24 privity where the allegedly defective laptop computer was purchased from retailer, not  
25 the manufacturer-defendant); *Harlan v. Roadtrek Motorhomes, Inc.*, No. 07-CV-686,  
26 2009 WL 928309, at \*14 (S.D. Cal. Apr. 2, 2009) (granting summary judgment on  
27 implied warranty claims because plaintiffs purchased motorhome from dealer and  
28 were not in vertical privity with defendant-manufacturer). Because Plaintiffs are not

1 in privity with Toyota, their implied warranty claim must fail as a matter of law.

2 Furthermore, Plaintiffs' attempts to circumvent the threshold privity  
3 requirement are unavailing. Plaintiffs first argue that "privity is not required in this  
4 case because Plaintiffs and Class members are intended third-party beneficiaries of  
5 contracts between Toyota and its dealers." (MCC, ¶ 363). Although courts have  
6 recognized a limited exception to the privity requirement if a plaintiff can show that  
7 he was a third-party beneficiary of a contract between the defendant and a third-party,  
8 this exception does not apply here, because Plaintiffs have failed to identify an  
9 enforceable contract expressly made for their benefit. It is well-established that third-  
10 party beneficiary status is a matter of contract interpretation, and a plaintiff seeking to  
11 enforce a contract as a third-party beneficiary "must plead a contract which was made  
12 expressly for his or her benefit and one in which it clearly appears that he or she was a  
13 beneficiary." *In re NVIDIA GPU Litig.*, No. C 08-04312, 2009 WL 4020104, at \*6  
14 (N.D. Cal. Nov. 19, 2009) (citing *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal.  
15 App. 4th 949, 957, 23 Cal. Rptr. 3d 233, 238 (2005)).

16 Plaintiffs assert that they are the intended third-party beneficiaries of Toyota's  
17 "warranty agreements." (MCC, ¶ 363). They allege that "[t]he dealers were not  
18 intended to be the ultimate consumers of the Defective Vehicles and have no rights  
19 under the warranty agreements ... [which] were designed for and intended to benefit  
20 the ultimate consumers only." (*Id.*). This position is untenable given that Plaintiffs,  
21 as a matter of law, cannot claim to be third-party beneficiaries of the Warranty  
22 Manuals. Plaintiffs are a small fraction of the millions of potential customers who  
23 could have purchased a Toyota after it was sold to the dealer. The transactions  
24 between Toyota and the dealers occur without any knowledge of, much less intent to  
25 benefit, any of the Plaintiffs. There is simply no legal support for Plaintiffs' claim  
26 that they should be considered intended third party beneficiaries as a way around the  
27 privity rule. The fallacy of this proposition is obvious. Such an exception would  
28 absolutely swallow the privity rule in the context of manufacturer-to-dealer and then

1 dealer-to-consumer transactions, and flies in the face of a litany of California cases,  
2 including automobile defect cases. *See Clemens*, 534 F.3d at 1023; *Osborne*, 198 Cal.  
3 App. 3d at 656 n.6; *Harlan*, 2009 WL 928309, at \*14; *see also NVIDIA*, 2009 WL  
4 4020104, at \*6 (dismissing lawsuit where computer owners brought class action claim  
5 against graphic card manufacturer); *see Cooper Power Sys., Inc. v. Union Carbide*  
6 *Chem. & Plastics Co.*, 123 F.3d 675 (7th Cir. 1997) (purchasers of paint and paint  
7 resin were “remote parties” and not intended third party beneficiaries of contract  
8 between manufacturers and distributors). This is simply not an exception.

9 Plaintiffs next seek to avoid satisfying the privity requirement by arguing that  
10 privity is not required “because Plaintiffs’ and Class members’ Toyotas are dangerous  
11 instrumentalities due to the aforementioned defects and nonconformities.” (MCC, ¶  
12 363). While no California decisions support this non-existent “exception” to the  
13 privity rule, Plaintiffs are not the first to attempt such an argument. Earlier this year,  
14 the Northern District of California noted that California courts have not abandoned  
15 privity concepts where “dangerous” products are involved. *Salinas v. City of San*  
16 *Jose*, No. C09-04410, 2010 WL 725803, at \*1 (N.D. Cal. Feb. 26, 2010) (citing  
17 *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 346-48, 5 Cal. Rptr. 863 (1960)  
18 (rejecting proposition that “privity is not required where the item sold is inherently  
19 dangerous.”)).

20 The bottom line is that Plaintiffs cannot unilaterally plead around the scope of  
21 required privity that “California courts have painstakingly established.” *Clemens v.*  
22 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1024 (9th Cir. 2008). Plaintiffs’ implied  
23 warranty claims must be dismissed, because they cannot establish privity of contract  
24 and the privity exceptions pled in the MCC do not apply as a matter of law.<sup>18</sup>

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26 <sup>18</sup> Additionally, California law is clear that Plaintiffs’ allegations concerning alleged  
27 representations and advertising materials from Toyota do not provide a privity  
28 exception for implied warranty claims. *See Burr v. Sherwin Williams Co.*, 42 Cal. 2d  
682, 696, 268 P.2d 1041 (1954). *Wolph v. Acer Am. Corp.*, No. C 09-01314, 2009

2. *Many Plaintiffs Have Not Alleged Manifestation of a Defect And Thus Cannot Bring a Claim for Breach of Implied Warranty.*

Additionally, on separate grounds, the 22 Consumer Plaintiffs<sup>19</sup> and all four Non-Consumer Plaintiffs cannot assert a claim for breach of implied warranty, because their vehicles have not experienced manifestation of the alleged defect. (See MCC, ¶¶ 32-75). Courts in California and elsewhere have held that a product that has not manifested a defect or malfunction cannot be deemed to have violated any implied warranty of merchantability. See *Am. Suzuki Motor Corp. v Super. Ct. of L.A. Cnty.*, 37 Cal. App. 4th 1291, 1296-98, 44 Cal. Rptr. 2d 526, 529-31 (1995) (rejecting proposition that remote fear or expectation that vehicle would manifest defect could give rise to a claim for breach of the implied warranty of merchantability); see also *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 297-98 (4th Cir. 1989) (affirming dismissal of plaintiffs' implied warranty claims where plaintiffs' vehicles did not suffer from the alleged defect); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 460 (D.N.J. 1998) ("In most jurisdictions, the courts recognize that unless a product actually manifests the alleged defect, no cause of action for breach of express or implied warranty or fraud is actionable."); *In re Air Bag Prods. Liab. Litig.*, 7 F. Supp. 2d 792, 805-06 (E.D. La. 1998) (holding that "allegation of manifest injury or defect" is a "central tenet[ ]" of an implied warranty claim); *Sheris v Nissan N. Am., Inc.*, No. 07-2516, 2008 WL 2354908, at \*6 (D.N.J. June 3, 2008) ("The weight of authority, from courts across the country, indicates that plaintiffs may not recover for breach of the implied warranty of merchantability under the facts' where plaintiffs have driven their cars without problems for years.").

Because they have not alleged any manifestation of defect in their vehicles, as previously explained, *supra* Section II.C., 1 at pp 10-13, the 22 Consumer and 4 Non-

WL 2969467, at \*4 (N.D. Cal. Sept. 14, 2009).

<sup>19</sup> See list of 22 Plaintiffs, Gilford Decl. Ex. A-2, ("Grp. 1 Pls.").

1 Consumer Plaintiffs' claim for breach of implied warranty of merchantability fails as a  
2 matter of law.<sup>20</sup>

3 **H. Plaintiffs' Claims Under the Magnuson-Moss Warranty Act Fail as a**  
4 **Matter of Law.**

5 1. *Plaintiffs Have Failed to Establish a State Law Warranty Claim*  
6 *Under Magnuson-Moss.*

7 The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.* ("Magnuson-  
8 Moss") authorizes civil actions by consumers to enforce the terms of an implied or  
9 express warranty under state law. *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App.  
10 4th 824, 833, 51 Cal. Rptr. 3d 118, 124 (2006). It requires the *application* of state  
11 warranty laws; it does not create additional federal law protections or *expand* a  
12 plaintiff's rights under state warranty law. *Stearns*, 2009 WL 1635931, at \*9;  
13 *Daugherty*, 144 Cal. App. 4th at 833. As such, dismissal of a plaintiff's state law  
14 warranty claims requires the dismissal of the plaintiff's claim under Magnuson-Moss.  
15 *Daugherty*, 144 Cal. App. 4th at 833 ("[T]he trial court correctly concluded that  
16 failure to state a warranty claim under state law necessarily constituted a failure to  
17 state a claim under Magnuson-Moss."). *See also Birdsong v. Apple, Inc.*, 590 F.3d  
18 955, 958 n.2 (9th Cir. 2009) (dismissing Magnuson-Moss claims "because we  
19 conclude that the plaintiffs have failed to state a claim for breach of an express or  
20 implied warranty" under state law); *Gertz v. Toyota Motor Corp.*, *supra* (Court  
21 dismisses Magnuson-Moss claim based on Plaintiff's failure to state claim for breach  
22 of state warranty claim). As explained above, Plaintiffs' state law warranty claims fail  
23 for numerous reasons, necessitating the failure of the Consumer Plaintiffs'<sup>21</sup> warranty  
24

25 \_\_\_\_\_  
26 <sup>20</sup> As explained *supra* at Section II.F.5.c, at pp. 37-38, the implied warranty claims  
27 for 27 Plaintiffs also fail for lack of pre-suit notice as required under Cal. Com. Code  
28 § 2607.

<sup>21</sup> This claim is only asserted by the Consumer Plaintiffs.



1 claims under Magnuson-Moss.

2 2. *Numerous Plaintiffs Failed to Follow Toyota's Informal Dispute*  
3 *Resolution Procedures as Required by 15 U.S.C. § 2310(a).*

4 Even if Plaintiffs' state law express warranty claim were to survive this Motion  
5 to Dismiss, Magnuson-Moss claims must be dismissed as to those Plaintiffs who  
6 failed to take advantage of Toyota's informal dispute procedures. Magnuson-Moss  
7 contains an express policy encouraging the use of informal dispute settlement  
8 mechanisms "whereby consumer disputes are fairly and expeditiously settled." 15  
9 U.S.C. § 2310(a). Congress has declared that a consumer or a class of consumers may  
10 not proceed in a civil action unless the consumer or class representative first resorts to  
11 the warrantor's informal dispute settlement procedure. 15 U.S.C. § 2310(a)(3)(C)(i),  
12 (ii).

13 By implication, Plaintiffs have conceded that all named Plaintiffs, with the  
14 exception of Susan Gonzalez and Carl Nyquist, have failed to resort to Toyota's  
15 informal dispute settlement procedures.<sup>22</sup> See Gilford Decl. Ex. A-6, ("Grp. 5 Pls.").  
16 Plaintiffs allege that they should be "excused" from satisfying this statutory  
17 requirement because Toyota allegedly "knew, should have known, or was reckless in  
18 not knowing" of the purported defects and "nonetheless failed to rectify the situation  
19 and/or disclose the defective design." (MCC, ¶ 388).

20 This Court has expressly rejected the contention that a warrantor's alleged  
21 knowledge or concealment of a purported defect excuses a plaintiff from resorting to  
22 the informal dispute settlement process. *Parkinson v. Hyundai Motor Am.*, 258 F.R.D.  
23 580, 593 (C.D. Cal. 2008). In *Parkinson*, the plaintiffs filed a putative class action  
24

25  
26 <sup>22</sup> Plaintiff's Warranty Manual expressly describes Toyota's informal Dispute  
27 Settlement Program and the steps Toyota owners should take to invoke the program:  
28 consumers "***must use the Dispute Settlement Program before seeking remedies***  
***through a court action pursuant to the Magnuson-Moss Warranty Act.***" Gilford  
Decl., Ex. B, Warranty Manuals, at 22, 99, 184.



1 against Hyundai asserting claims under the CLRA, UCL, and Magnuson-Moss Act,  
2 based on alleged defects in the “flywheel system of the 2003 Hyundai Tiburon GT.”  
3 *Id.* at 585-87. Although the plaintiffs alleged that Hyundai knew about the alleged  
4 defects and failed to disclose the defects to consumers, *Id.* at 596, this Court held that  
5 the plaintiffs were not excused from using Hyundai’s informal dispute settlement  
6 procedures on the grounds that such attempts would be “unnecessary and/or futile.”  
7 Specifically, the Court found these allegations insufficient to overcome “the strong  
8 presumption in favor of encouraging alternative dispute resolution under the MMA.”  
9 *Id.* at 593.

10 For each of the above-stated reasons, Plaintiffs’ Magnuson-Moss claim must be  
11 dismissed.

12 **I. Plaintiffs Fail to State a Claim for Revocation of Acceptance.**

13 *1. Plaintiffs May Not Seek Revocation of Acceptance Against a*  
14 *Manufacturer Who Did Not Sell The Product to the Plaintiff.*

15 The Consumer Plaintiffs are prohibited from claiming revocation of acceptance  
16 because, again, they are not in privity with Toyota. The statute governing revocation  
17 of acceptance specifically limits application of the remedy to sellers who contract  
18 directly with plaintiff purchasers: “The buyer may revoke his acceptance ... if his  
19 acceptance was reasonably induced ... by the *seller’s* assurances,” and revocation “is  
20 not effective until the buyer notifies the *seller* of it.” Cal. Com. Code § 2608  
21 (emphasis added).

22 The notion that a revocation claim under the UCC does not lie against a  
23 manufacturer is further supported by other California statutes governing sales  
24 disputes. The Song-Beverly Consumer Warranty Act specifically defines a  
25 “manufacturer” and provides for remedies against manufacturers while  
26 acknowledging interplay with the UCC. Cal. Civ. Code § 1791. If the California  
27 legislature had intended revocation of acceptance to apply against a manufacturer, it  
28 would have included the term in the statute. Similarly, claims for rescission, which

1 were the subject of § 2608 before it was amended for procedural clarification, require  
2 privity of contract. *See* Cal. Civ. Code § 1689; Cal. Com. Code § 2608 cmt. 1.  
3 Because a revocation of acceptance claim is essentially an evolved form of a  
4 rescission claim, the privity rule applies to a revocation claim.

5 In jurisdictions like California where the privity rule is preserved, courts in  
6 automobile defect cases have consistently held that revocation under the UCC is not  
7 available against the automobile manufacturer when the vehicle was purchased from  
8 the dealer. Under Article 2 of the UCC, all of the relevant rights of aggrieved buyers  
9 “concern what the buyer is entitled to as against the ‘seller.’” *Seekings v. Jimmy GMC*  
10 *of Tucson, Inc.*, 130 Ariz. 596, 600, 638 P.2d 210, 214 (1981). “In general, the buyer  
11 is entitled to recovery of the purchase price plus all damages caused by the seller's  
12 failure to deliver conforming goods; the seller can recover the goods sold .... Thus,  
13 the manufacturer logically cannot share the seller's burden or benefit in returning the  
14 contracting parties to their presale positions.” *Id.* at 600, 638 P.2d at 214.

15 “[T]he remedy of revocation of acceptance under Code § 8.2-608 [which  
16 contains language identical to the California provision] is conceptually inapplicable to  
17 any persons other than the parties to the contract of sale sought to be rescinded.”  
18 *Gasque v. Mooers Motor Car Co.*, 227 Va. 154, 162-63, 313 S.E.2d 384, 390 (1984).  
19 *See also Voytovich v. Bangor Punta Operations, Inc.*, 494 F.2d 1208, 1211 (6th Cir.  
20 1974) (vacating award of revocation of acceptance while holding that buyer-seller  
21 relationship is required); *Fedrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190  
22 (N.D. Ga. 2005) (granting summary judgment to car manufacturer because revocation  
23 requires privity of contract and may only be asserted against a seller); *Mydlach v.*  
24 *DaimlerChrysler Corp.*, 226 Ill. 2d 307, 331, 875 N.E.2d 1047, 1064 (2007) (granting  
25 summary judgment to car manufacturer because “revocation of acceptance is  
26 ‘conceptually inapplicable’ to a nonseller”); *Henderson v. Chrysler Corp.*, 191 Mich.  
27 App. 337, 341, 477 N.W.2d 505, 507 (1991) (reversing judgment in favor of  
28 purchaser and holding that action for revocation of acceptance is not available against

1 car manufacturer).

2 Here, Plaintiffs purchased their vehicles directly from independent, third-party  
3 Toyota dealerships, not from Toyota. (MCC, ¶¶ 78, 363, 385). Because Toyota was  
4 not a “seller” of the allegedly “Defective Vehicles,” Plaintiffs are thus prohibited from  
5 asserting a revocation of acceptance claim against Toyota.

6 2. *Plaintiffs Have Failed to Plead the Required Elements of a Claim*  
7 *for Revocation of Acceptance.*

8 Pursuant to Cal. Com. Code § 2608, each Plaintiff must establish that he (1)  
9 revoked acceptance within a reasonable time after discovering a defect, (2) revoked  
10 acceptance before causing any substantial change in the vehicle, and (3) notified the  
11 seller of his revocation prior to filing this lawsuit. Plaintiffs admit that, at most, only  
12 14 of the 48 named Consumer Plaintiffs notified Toyota of revocation prior to filing  
13 this suit. (MCC, ¶ 366). “[N]otice by initiation of legal proceedings does not satisfy  
14 the statutory mandate.” *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725, 729 (Miss.  
15 1991). Rather, notice must be given prior to a lawsuit because “the obligation under  
16 the Code to act in good faith would require that the buyer not only give notice but do  
17 so under such circumstances that the seller might have the opportunity ... to remedy  
18 his breach without the buyer’s jumping into a lawsuit.” *Id.* at 729. Because 38  
19 Plaintiffs failed to provide Toyota with pre-suit notice of revocation, their claims fail  
20 as a matter of law and should be dismissed. *See* Gilford Decl. Ex. A-7, (“Grp. 6  
21 Pls.”); *See also J.A. Indus., Inc. v. All Am. Plastics, Inc.*, 133 Ohio App. 3d 76, 83,  
22 726 N.E.2d 1066, 1070 (1999); *Golden Needles Knitting & Glove Co. v. Dynamic*  
23 *Mktg. Enters., Inc.*, 766 F. Supp. 421, 429 (W.D. N.C. 1991); *Mack Boring & Parts,*  
24 *Co. v. Novis Marine, Ltd.*, No. 06-2692, 2008 WL 4371769, \*7-\*8 (D.N.J. 2008).

25 Of the 14 remaining Consumer Plaintiffs, the revocation claims of Plaintiffs  
26 Atwater, Heidenreich, J. and M. Laidlaw<sup>23</sup> and Perkin fail because they no longer own

27  
28 <sup>23</sup> Plaintiffs, such as the Laidlaws, waive their revocation claim by simply abandoning  
the vehicle on the dealer’s lot. *Freidman v. Gen. Motors Corp.*, No. 08 Civ. 2458,  
47

1 their vehicles. *See* Gilford Decl. Ex. A-8, (“Grp. 7 Pls.”). Accordingly, they are  
2 unable to return the vehicles and cannot revoke acceptance as a matter of law.  
3 *Delhomme Indus., Inc. v. Houston Beechcraft, Inc.*, 735 F.2d 177, 181 (5th Cir. 1984).

4 The nine remaining Consumer Plaintiffs’ claims should be dismissed because  
5 they do not allege facts sufficient to establish each required element. For instance,  
6 these Consumer Plaintiffs fail to allege that they have discontinued use of their  
7 vehicles. Specifically, Baldisseri has driven his car for 13 months, and Nyquist and  
8 Visconi have continuously driven 2006 and 2007 models since their purchase, causing  
9 substantial change to the vehicles. As a matter of law, these nine Plaintiffs have failed  
10 to plead facts sufficient to establish that they revoked acceptance within a reasonable  
11 time or before they caused substantial change to the vehicles. *See Computerized*  
12 *Radiological Servs. v. Syntex Corp.*, 786 F.2d 72 (2d Cir. 1986) (citing California  
13 law); *Freidman*, 2010 WL 2540950, at \*5. *See also Gasque*, 227 Va. at 162; *Smyser*  
14 *v. W. Star Trucks Corp.*, 247 Wis. 2d 282, 634 N.W.2d 134 (Ct. App. 2001); *Jenkins*  
15 *v. Gen. Motors Corp.*, 240 Ga. App. 636, 524 S.E.2d 324 (1999); *Ford Motor Credit*  
16 *Co. v. Mellor*, 748 S.W.2d 410 (Mo. Ct. App. 1988); *Golembieski v. O’Rielly R.V.*  
17 *Ctr., Inc.*, 147 Ariz. 134, 708 P.2d 1325 (Ct. App. 1985).

18 Likewise, the Non-Consumer Plaintiffs fail to properly plead a claim under  
19 Section 2608. First, Jerry Baker Auto Sales, LLC, Auto Lenders and Deluxe Holdings  
20 do not claim to purchase any vehicles from Toyota and therefore fail to establish  
21 privity.<sup>24</sup> Allegations of “direct dealing” and a legal conclusion that the parties are “in  
22 privity” are insufficient. Second, Green Spot Motors and Deluxe Holdings fail to  
23 allege no substantial change to the vehicles. Third, Jerry Baker Auto Sales, LLC and  
24 Green Spot Motors fail to allege that they notified Toyota of revocation prior to filing  
25

26 2010 WL 2540950, at \*5 (S.D.N.Y. June 22, 2010).

27 <sup>24</sup> Plaintiff Auto Lenders is a residual value insurer and did not purchase any vehicles  
28 from anyone.

1 suit. Fourth, Deluxe Holdings does not allege that it no longer rents Toyota vehicles;  
2 the presumption is that the cars continue to be rented, which causes substantial change  
3 to the vehicles and is inconsistent with the notion of revocation. *Jenkins*, 240 Ga.  
4 App. at 636. None of the Plaintiffs properly allege a claim for revocation of  
5 acceptance, and the MCC should therefore be dismissed.

6 3. *Plaintiffs' Revocation Claim Also Fails Because the Express*  
7 *Warranty Limits Remedies to Repair and Adjustment.*

8 Plaintiffs' revocation claim also fails because, as previously addressed, *supra*  
9 Section II.F.4 at pp. 34-36, Toyota properly limited Plaintiffs' remedies to "necessary  
10 repairs and adjustments" per the express warranty. The UCC provision permitting  
11 revocation is inapplicable when a warranty limits remedies. 4 Lawrence's Anderson  
12 on the Unif. Com. Code § 2-608:61 (3d ed. 2009); *Palmucci v. Brunswick, Corp.*, 311  
13 N.J. Super. 607, 710 A.2d 1045, 1048 (1998).

14 **J. Plaintiffs' Claims for "Breach of Contract/Common Law Warranty"**  
15 **Fail for the Same Reasons Plaintiffs' Breach of Express and Implied**  
16 **Warranty Claims Fail.**

17 Plaintiffs' claims for "breach of contract/common law warranty" (Count VIII)  
18 are duplicative of their breach of warranty claims (Counts IV, V) and should,  
19 therefore, be dismissed or stricken. "In treating common law warranties, it has been  
20 recognized that statutory standards should be utilized where appropriate." *Pollard v.*  
21 *Saxe & Yolles Dev.*, 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648 (1974). In California,  
22 breach of warranty claims are governed by Cal. Com. Code §§ 2313 and 2314.  
23 Accordingly, any claim for "common law" breach of warranty is redundant and may  
24 be stricken pursuant to Fed. R. Civ. P. 12(f). *Wilkerson v. Butler*, 229 F.R.D. 166, 170  
25 (E.D. Cal. 2005) ("A 'redundant' matter consists of allegations that constitute a  
26 needless repetition of other averments ...").

27 Even if the Court were to address these claims separately, the same legal  
28 principles would be applied as discussed in Sections F and G, *supra*. See, e.g., *Long*



1 *v. Hewlett-Packard Co.*, No. 06-02816, 2007 WL 2994812, at \*5-\*6 (N.D. Cal. July  
2 27, 2007) (applying Commercial Code provisions to common law breach of express  
3 warranty claim). Accordingly, Plaintiffs' breach of contract/common law warranty  
4 claims fail for the same reasons as their express and implied warranty claims and,  
5 therefore, should be dismissed or stricken from the MCC.

6 **K. Plaintiffs' Claims for Unjust Enrichment Fail as a Matter of Law.**

7 Plaintiffs' unjust enrichment claim fails because there is no unjust enrichment  
8 cause of action in California. Even if this Court were to recognize such a claim,  
9 Plaintiffs' unjust enrichment claim (Count VIII) still fails, because Plaintiffs have pled  
10 numerous adequate remedies at law and are entitled to nothing more.

11 *1. Unjust Enrichment is Not a Recognized Cause of Action.*

12 California state and federal courts have repeatedly held that unjust enrichment  
13 is not a valid cause of action. *See, e.g., In re Late Fee & Over-Limit Fee Litig.*, 528 F.  
14 Supp. 2d 953, 966 (N.D. Cal. 2007) ("[T]here simply 'is no cause of action in  
15 California for unjust enrichment.'" (internal citation omitted); *Walker v. USAA Cas.*  
16 *Ins. Co.*, 474 F. Supp. 2d 1168, 1174 (E.D. Cal. 2007) ("There is no cause of action in  
17 California for unjust enrichment."); *Melchior v. New Line Prods., Inc.*, 106 Cal. App.  
18 4th 779, 793, 131 Cal. Rptr. 2d 347, 357 (2003) ("[T]here is no cause of action in  
19 California for unjust enrichment."); *Jogani v. Super. Ct.*, 165 Cal. App. 4th 901, 911,  
20 81 Cal. Rptr. 3d 503, 511 (2008) ("[U]njust enrichment is not a cause of action.  
21 Rather, it is a general principle underlying various doctrines and remedies"); *Gertz v.*  
22 *Toyota Motor Corp.*, *supra* (same). Under the weight of this authority, Plaintiffs'  
23 claim for unjust enrichment must be dismissed.

24 *2. Plaintiffs Allege Numerous Adequate Remedies at Law.*

25 The theory of unjust enrichment is equitable in nature and unavailable if there is  
26 an adequate remedy at law, such as a statutory or express warranty claim. *Baggett v.*  
27 *Hewlett-Packard Co.*, 582 F. Supp. 2d 1261, 1271 (C.D. Cal. 2007) (dismissing unjust  
28 enrichment claim with prejudice where Plaintiff alleged claims for fraud, violations of



1 the CLRA, and violations of the UCL on the grounds that “Plaintiff will be able to  
2 pursue his remedies through those claims.”); *In re Ford Motor Co. Speed Control*  
3 *Deactivation Switch Prods. Liab. Litig.*, 664 F. Supp. 2d 752 (E.D. Mich. 2009)  
4 (dismissing unjust enrichment claim where express warranty defined the parties’  
5 rights); *In re Facebook PPC Adver. Litig.*, No. 5:09-cv-03043, 2010 WL 1746143  
6 (N.D. Cal. Apr. 22, 2010) (dismissing unjust enrichment claim where express contract  
7 defined the parties’ rights). In this case, Plaintiffs do not plead that they lack an  
8 adequate remedy at law. To the contrary, they allege nine purportedly adequate  
9 remedies at law: CLRA, UCL, FAL, an express warranty, an implied warranty,  
10 revocation of acceptance, Magnuson-Moss, an express contract/common law warranty  
11 and fraud. (MCC, ¶¶ 295-405). Plaintiffs’ unjust enrichment claim adds nothing, and  
12 therefore must be dismissed.

13 **L. Plaintiffs’ Request for Injunctive Relief Requiring Toyota to**  
14 **Implement Fail-Safe Mechanisms Amounts to a Court-Ordered**  
15 **Nationwide Recall and is Preempted by the National Traffic and**  
16 **Motor Vehicle Safety Act.**

17 Plaintiffs’ request for “[a]n injunction ordering Toyota to implement an  
18 effective fail-safe mechanism on all vehicles with ETCS” (MCC, Prayer for Relief  
19 (i)), must be stricken, because Plaintiffs’ request for a nationwide court-ordered recall  
20 is preempted by the National Traffic and Safety Act of 1966 (the “Safety Act”), 49  
21 U.S.C. §§ 30101 *et seq.*

22 The Safety Act vests authority over matters regarding motor vehicle safety in  
23 the Secretary of Transportation or his delegate, and the Secretary has delegated this  
24 authority to the NHTSA. *See* 49 U.S.C. §§ 30119, 105(d). The NHTSA is charged  
25 with establishing motor vehicle safety standards, investigating alleged defects or  
26 noncompliance, and issuing and administering motor vehicle recalls based on a  
27 determination of a defect impacting safety. *See* 49 U.S.C. §§ 30111, 30118-30120.  
28 49 U.S.C. § 30112 prohibits the manufacturing and selling of vehicles that do not

1 comply with the safety standards determined by the NHTSA, and 49 U.S.C. § 30116  
2 requires manufacturers and distributors to repurchase or remedy vehicles that have  
3 been purchased by dealers and determined by the NHTSA to be defective or in  
4 noncompliance with the NHTSA standards but have not yet been sold to purchasers.  
5 In sum, the NHTSA has the authority to do precisely what Plaintiffs seek here – issue  
6 a vehicle safety standard and administer a recall to implement measures that remedy a  
7 defect impacting safety.

8 As Plaintiffs recognize (MCC, ¶¶ 113-219), the NHTSA has been and continues  
9 to be intimately involved in investigating allegations of UA in Toyota vehicles. *See*,  
10 *e.g.*, Request for Judicial Notice, dated September 13, 2010 (“RJN”), Ex. 1, Daniel C.  
11 Smith, Associate Administrator Enforcement, NHTSA, “Overview of NHTSA and its  
12 Activities Related to Unintended Acceleration and Vehicle Electronics,” June 30,  
13 2010.<sup>25</sup> Significantly, in February 2010, the NHTSA requested information and  
14 documents from Toyota relating to Toyota’s UA recalls. *See* RJN Ex. 2, NHTSA  
15 Information Request dated February 16, 2010. The NHTSA requested the information  
16 “in the interest of assuring that the problems with UA have been fully identified and  
17 addressed.” *Id.* at page 23. The NHTSA also indicated that its goal was to “more  
18 fully understand and evaluate, among other things, whether the scope of [Toyota’s UA  
19 recalls] is sufficiently broad.” *Id.* Clearly, the NHTSA has exercised its sole  
20 authority to monitor and supervise Toyota’s UA recall campaigns.

21 Beyond its involvement in the UA recalls, the NHTSA has conducted tests of  
22 Toyota vehicles involved in crashes blamed on UA, and has enlisted the expertise of  
23 researchers and engineers from the National Academy of Sciences and NASA to study  
24 UA and whether there are potential for defects in the electronics or software. The  
25

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26 <sup>25</sup> Toyota is attaching this document for the court's convenience and for informational  
27 purposes only. Toyota is not relying on the contents of this document to support its  
28 motion to dismiss. *See supra* at note 5.

1 NHTSA recently reported to Congress that its preliminary findings have not identified  
2 any electronic or software defects in the Toyota vehicles. *See* RJN Ex. 1; *see*  
3 *generally* So Far, Toyota Electronics Are Passing Muster, Automotive News, Aug. 16,  
4 2010, at 2010 WLNR 16515704 (discussing the NHTSA's ongoing investigation and  
5 preliminary findings). Thus, there is a very real and substantial possibility that any  
6 court action on Plaintiffs' request for an order compelling the recall of ETCS-i-  
7 equipped Toyota vehicles may frustrate, interfere and conflict with the NHTSA's  
8 ongoing efforts to investigate and address the very same issues.

9       Given the comprehensive federal administrative scheme that Congress has  
10 established and the ongoing, active involvement in this matter of the administrative  
11 agency tasked with responsibility under that scheme, a "nationwide court-ordered  
12 recall would conflict directly with and frustrate the Safety Act." *Lilly v. Ford Motor*  
13 *Co.*, No. 00C7372, 2002 WL 84603, at \*5 (N.D. Ill. Jan. 22, 2002). Several courts  
14 addressing such requests have held that the claims are preempted by the Safety Act.  
15 *See id.* (holding that the claim was preempted and explaining that "[i]t is clear that  
16 Congress did not intend for the federal courts to have authority to order recalls of  
17 motor vehicles on a nationwide basis for several model years."); *In re*  
18 *Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 153 F. Supp. 2d 935, 944-45  
19 (S.D. Ind. 2001) (holding that request for nationwide recall was conflict preempted on  
20 the basis of frustration of Congress' purpose under the Safety Act of providing  
21 exclusive administration of recalls through the NHTSA); *see also Coker v.*  
22 *DaimlerChrysler Corp.*, No. 01CVS1264, 2004 WL 32676 (N.C. Super. Jan. 5, 2004)  
23 *aff'd*, 172 N.C. App. 386, 617 S.E.2d 306 (2005); *see also* 49 U.S.C. § 30118(b)(1)  
24 (the Secretary of Transportation has authority to "make a final decision that a motor  
25 vehicle ... contains a defect related to motor vehicle safety.)".

26       In the few instances where courts addressing such requests have determined that  
27 they were not wholly preempted under the Safety Act, the courts concluded that the  
28 relief sought was something short of a court-ordered nationwide recall. *See, e.g.,*

1 *Chamberlan v. Ford Motor Co.*, 314 F. Supp. 2d 953, 958, 964-65 (N.D. Cal. 2004)  
2 (finding no conflict preemption where plaintiffs sought only limited, statewide  
3 injunctive relief, such as inclusion in an ongoing, voluntary, partial recall); *Kent v.*  
4 *DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208, 1217 n.3 (N.D. Cal. 2002) (finding no  
5 conflict preemption at pleadings stage where plaintiffs from 11 states sought only a  
6 common fund for repairs); *cf. Talalai v. Cooper Tire & Rubber Co.*, No. 00CV5694,  
7 2001 WL 1877265, at \*7 (D.N.J. Jan. 8, 2001) (finding no complete preemption  
8 where Plaintiffs certified that they sought only property damages). Here, Plaintiffs  
9 unambiguously seek a nationwide recall of Toyota vehicles with ETCS-i, including  
10 vehicles sold and those yet to be sold, despite the NHTSA's ongoing investigation.  
11 Because the prospect of a conflict between judicial proceedings and action by the  
12 NHTSA is patently clear, this Court should find that Plaintiffs' request for injunctive  
13 relief is preempted by the Safety Act.

14 **M. This Court Should Defer to the NHTSA Under the Doctrine of**  
15 **Primary Jurisdiction and Dismiss Plaintiffs' Claim for Injunctive**  
16 **Relief.**

17 For reasons similar to those discussed above, this Court should defer to the  
18 NHTSA under the doctrine of primary jurisdiction and strike Plaintiffs' request for  
19 injunctive relief. The doctrine of primary jurisdiction is a court-created doctrine that  
20 is concerned with promoting proper relationships between the courts and  
21 administrative agencies charged with particular regulatory duties. *Digital Commc'ns*  
22 *Network, Inc. v. AT&T Wireless Servs.*, 63 F. Supp. 2d 1194, 1197 (C.D. Cal. 1999).  
23 The doctrine is "a principle, now firmly established, that in cases raising issues of fact  
24 not within the conventional expertise of judges or cases requiring the exercise of  
25 administrative discretion, agencies created by Congress for regulating the subject  
26 matter should not be passed over." *Far E. Conference v. United States*, 342 U.S. 570,  
27 574-75, 72 S. Ct. 492, 96 L. Ed. 576 (1952). In determining whether to invoke the  
28 doctrine, courts will consider whether (1) the case involves a matter within the special

1 expertise of the agency; and (2) there is a need to promote uniformity in  
2 administrative policy or a possibility of inconsistent results between the courts and the  
3 agency. *Id.*; see also *Farmers Ins. Exch. v. Super. Ct.*, 2 Cal. 4th 377, 390, 6 Cal.  
4 Rptr. 2d 487, 496-97 (1992) (explaining that the doctrine of primary jurisdiction  
5 applies “whenever enforcement of [a] claim requires the resolution of issues which,  
6 under a regulatory scheme, have been placed within the special competence of an  
7 administrative body; in such a case the judicial process is suspended pending referral  
8 of such issues to the administrative body for its views”).

9 This Court should invoke the doctrine of primary jurisdiction in connection  
10 with Plaintiffs’ requested injunctive relief because this issue is within the special  
11 competence of the NHTSA. See *Am. Suzuki*, 37 Cal. App. 4th at 1299-1300; *Bussian*  
12 *v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 628-29 (M.D.N.C. 2006) (deferring  
13 claims relating to an ongoing NHTSA investigation under primary jurisdiction  
14 doctrine). The NHTSA, through the Secretary of Transportation, is tasked by federal  
15 law with the responsibility of initiating and conducting recalls of automobiles. See 49  
16 U.S.C. §§ 30118, 30119, 30120. Moreover, as explained above, the NHTSA has been  
17 investigating allegations of UA in the Toyota vehicles. Accordingly, this Court  
18 should defer to the NHTSA as to recall-type remedies because recalls are an issue  
19 within the agency’s special competence.

20 **N. Plaintiffs’ Request for “Restitution and/or Restitutionary**  
21 **Disgorgement” Should Be Stricken With Respect to the UCL and**  
22 **FAL Claims.**

23 Plaintiffs improperly seek a remedy for “... money Toyota acquired by unfair  
24 competition, including restitution and/or restitutionary disgorgement ...” that is not  
25 available to them under the UCL or FAL. (MCC, ¶¶ 329, 338, Prayer for Relief (b)).  
26 Under California law for statutory violations of the UCL or FAL, the remedies  
27 available to Plaintiffs are limited to restitution or injunctive relief. See *Tomlinson v.*  
28 *Indymac Bank, F.S.B.*, 359 F. Supp. 2d 891, 893 (C. D. Cal. 2005) (“The California



1 Supreme Court repeatedly has held that ‘under the UCL, prevailing plaintiffs are  
2 generally limited to injunctive relief and restitution.’”) (quoting *Korea Supply Co. v.*  
3 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29 (2003) (internal  
4 citation omitted). Plaintiffs are prohibited from seeking monetary damages or any  
5 non-restitutionary disgorgement (*i.e.*, profits) for such violations. *Korea Supply*, 29  
6 Cal. 4th at 1149-51. In other words, disgorgement is available as a remedy for UCL  
7 and FAL claims only to the extent that it constitutes restitution, not as a supplement to  
8 restitutionary relief.

9 Plaintiffs are entitled to “restitution,” and nothing more. To the extent that  
10 Plaintiffs are seeking “money” or “restitutionary disgorgement” in addition to  
11 restitution, such a request is duplicative, at best. *See Korea Supply*, 29 Cal. 4th at  
12 1149 (“The object of restitution is to restore the status quo ...”); *Starr-Gordon v.*  
13 *Mass. Mut. Life Ins. Co.*, No. Civ. S-03-68, 2006 WL 3218778, at \*7 (E.D. Cal. Nov.  
14 7, 2006) (“disgorgement is permissible only to the extent that it constitutes  
15 restitution”) (internal quotation marks and citation omitted). For these reasons,  
16 Plaintiffs’ request for “money Toyota acquired by unfair competition, including ...  
17 and/or restitutionary disgorgement” should be stricken under Rule 12(f) as immaterial,  
18 impertinent, and unduly prejudicial. If the Court excises this language, Plaintiffs will  
19 be left with prayers for “restitution” and injunctive relief – the only relief permitted  
20 under the UCL and FAL.

1     **III.   CONCLUSION**

2           For the foregoing reasons, Toyota respectfully requests that the Court grant its  
3     Motion to Dismiss and dismiss Plaintiffs' Economic Loss Master Consolidated  
4     Complaint in its entirety with prejudice. If the Court does not dismiss all of Plaintiffs'  
5     claims and prayers for relief in their entirety,<sup>26</sup> Toyota requests, in the alternative, that  
6     the Court grant its Motion to Strike in its entirety with prejudice.

7  
8     Dated: September 13, 2010     Respectfully submitted,

9  
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26     <sup>26</sup> Although Toyota has established that the MCC should be dismissed in its entirety,  
27     if the Court determines some claims survive this motion as to some Plaintiffs, the  
28     Court should nonetheless dismiss those Plaintiffs from this case who state no claim,  
      and dismiss claims as to particular Plaintiffs where appropriate. *See In re Heritage*  
      *Bond Litig.*, No. 02-ML-1475, 2003 WL 25779465, at\*5 (C.D. Cal. Aug. 18, 2003).